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ARTICLES

NOTES

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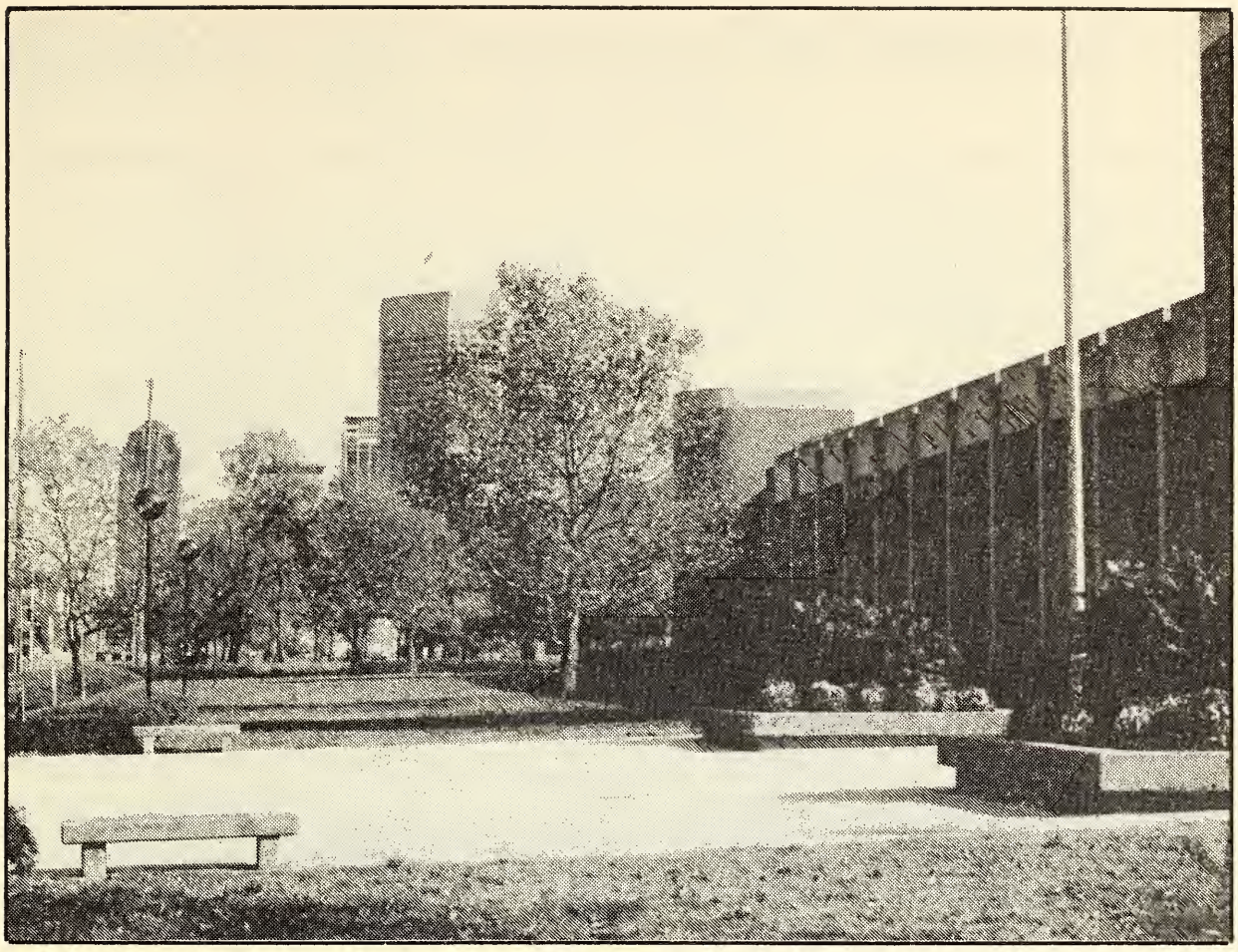

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ARTICLES

CYBERDOCTORS: THE VIRTUAL HOUSECALL—THE ACTUAL PRACTICE OF MEDICINE ON THE INTERNET IS HERE; IS IT A TELEMEDICAL ACCIDENT WAITING TO HAPPEN?

BARBARA J. TYLER*

INTRODUCTION

Zhu Ling was suffering.[1] A twenty-one-year-old student in the Chemistry Department at China's Tsinghua University, Zhu became weaker day by day and was dying.[2] The medical experts who attended her in China were baffled with her array of symptoms.[3] Zhu's friends who were studying in the Mechanics

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1. *See* Wang Chen, *China Expands Information Network*, BEIJING REV., July 1, 1996, *available in* 1996 WL 11664334. Some facts regarding Zhu Ling and her sudden illness were gleaned from this article.

2. *See* Naomi Craft, *No Touch Technique (Diagnosis and Treatment Via Internet)*, 312 BRIT. MED. J. 318 (1996). This article chronicles many details of Zhu Ling's 1995 illness and those who aided in its investigation and treatment.

3. *Id.* Zhu Ling initially experienced alopecia (baldness) and transient gastrointestinal distress. Subsequently, she developed a peripheral neuropathy and experienced a respiratory arrest before entering a deep coma. Following a short hospital stay, she recovered and returned to work in the university's industrial chemistry laboratory. However, Zhu once again relapsed and her condition deteriorated. She was readmitted to the hospital with a working diagnosis of Guillain-Barré syndrome. With her condition deteriorating, Zhu was then diagnosed with acute disseminated encephalomyelitis (an inflammation of the brain and nerve linings). Four months after the initial onset of her symptoms, her friends desperately consulted the Internet. *Id.*

Guillain-Barré syndrome is a neuropathy which causes a rapidly progressing inflammatory disease process characterized by muscular weakness and sensory loss that usually begins five days to three weeks after an infection, surgery, or immunization. *See* THE MERCK MANUAL OF DIAGNOSIS AND THERAPY § 11.131 (Robert Berkow, M.D. et al. eds., 16th ed. 1992) (visited June 25, 1997) <http://www.merck.com/!!t1VKOjwutTlbfOMBM/pubs/mmanual/html/jkilfjfb.htm>; *see also* TABER'S CYCLOPEDIC MEDICAL DICTIONARY 827-28 (Clayton L. Thomas ed., 18th ed. 1997). Guillian-Barré syndrome was named after two French neurologists, Georges Guillain and J.A.

Department at Peking University were determined to find help for her and decided to seek this help via the Internet.[4] Zhu's friend, Bei Zhicheng, broadcast Zhu's symptoms asking for medical help and received the first reply within only three hours.[5] Over the ensuing ten days, they received over 1000 email responses.[6] World famous medical experts became involved and diagnosed Zhu Ling's puzzling problem as thallium poisoning.[7] The diagnosis was confirmed after Zhu's parents arranged for appropriate samples to be tested.[8] The international medical discussion that took place on the Internet allowed a consortium of the world's finest experts to reach a consensus and formulate a protocol for Zhu Ling's treatment which ultimately saved her life.[9]

In contrast, a world away in Portland, Oregon, Andy Peake searched the

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Barré. *Id.*

The web site information located within this Article is not guaranteed to be accurate at the time of publication, because the Internet is always changing, adding, and removing sites. The sites are listed only to show the reader that information is available on every malady—even those that are very rare. In addition, entering the name of almost any disease in a server will access information about the malady.

4. *See* Chen, *supra* note 1. Sometime in Spring 1995, Zhu's friend, Bei Zhicheng, sent the SOS message on the Internet via the World-Wide Web asking for help. More than two-thirds of the replies were from doctors; the rest were from Chinese students living abroad and other well-wishers. *See* Craft, *supra* note 2; *see also* Henry H. Perritt, Jr., *Access to the National Information Infrastructure*, 30 WAKE FOREST L. REV. 51, 54 n.8 (1995) (pointing out that the Internet was designed as an interface which organizes information as a set of hypertext documents).

To access a computer network, a user needs a computer, modem, and a phone line. The computer user dials the computer service or "host." Once the host answers and connects, the user can communicate over the modem through the phone lines. The modem translates digital data from the sending computer into analog signals appropriate for phone lines. Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1066 (1994).

5. *See* Craft, *supra* note 2; *see also* Chen, *supra* note 1.

6. *See* Chen, *supra* note 1.

7. *Id. See, e.g.*, CECIL TEXTBOOK OF MEDICINE 72 (J. Claude Bennett & Fred Plum eds., 20th ed. 1996) [hereinafter CECIL]. Thallium is a trace metal and can enter the body through the skin, the respiratory system or the digestive system (ingestion). This work describes thallium poisoning as a sequelae of the use of pesticides and rodenticides which often contain this metal. Symptoms include a combination of nausea, vomiting and alopecia (hair loss), as well as other physical manifestations. Diagnosis is made through testing of blood and urine for thallium. Treatment consists of hemodialysis (filtering of the blood by artificial kidney). *Id.*

8. *See* Craft, *supra* note 2.

9. *Id.* Although thallium poisoning is recognized as an important part of Zhu Ling's clinical condition, her recovery has been slow and the subject of much debate. *Id.* However, medical texts state the prognosis after poisoning is not necessarily good. CECIL, *supra* note 7, at 72 ("As many as 30% of those poisoned suffer some residual effects. The neuropathy may persist for many months before resolving, and some are left with variable amounts of dementia, neuropathy, ataxia, visual impairment, alopecia, and myoclonus.").

Internet for answers to the mysterious disease that plagued his two children.[10] For six years, Peake found no answers to his six-year-old son Ethan's limited energy and need to spend time indoors.[11] In addition, Peake had a one-year-old daughter, Annelise, who had serious trouble breathing and wore both heart and respiratory monitors. Peake wondered what mysterious illness his children suffered from and whether they suffered the same illness. The answer came from Peake's computer. "Linda, I know what Ethan has," Peake announced to his wife in October 1995.[12] Peake had finally abandoned databases dealing with metabolic problems and tried instead a search on his home computer in which he entered Ethan's symptoms: general weakness (particularly in the neck and shoulders); droopy eyelids; ophthalmoplegia (when eyes appear to float around); intermittent respiratory distress; and delayed motor development.[13] Peake found four or five articles and discovered that there is a rare type of myasthenia gravis that most often shows up in children during the first two years of life. The disease, which affects siblings, is caused by genetic defects affecting neuromuscular transmission.[14] Ethan could ride a bike and kick a soccer ball six months after his diagnosis and the institution of appropriate drug intervention.[15]

These two true stories of potential life-saving uses of the computer are only the genesis in the inaugural saga of the computer's technological prowess and beneficial medical resource potential. The reality of the 1990s is that we are faced with not only our own personal health problems, but also those of a chronically ill health care system.[16] Intense rivalry for profits has caused

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10. *Dad Diagnoses Children's Illness by Using Internet*, COLUMBIAN, May 24, 1996, *available in* 1996 WL 10310494 [hereinafter *Dad Diagnoses*]. After searching futilely through the medical library at Oregon Health Sciences University, as well as buying medical dictionaries and texts, Andy Peake began his search on the Internet in the fall of 1995.

11. *Id.*

12. *Id.* Peake spent weeks searching the Internet using different search engines and terms before he landed on the answer. A rare neuromuscular disease that strikes only one or two people per million had claimed his children. This disease is called congenital myasthenia gravis (CMG). *Id.* CMG is a serious life-threatening condition in which the muscles weaken with repetitious use. The disease is one that can be greatly helped with the proper medication. *See* CECIL, *supra* note 7, at 2171-73.

13. *Dad Diagnoses*, *supra* note 10.

14. *Id.* For a comprehensive medical discussion of myasthenia gravis, see CECIL, *supra* note 7, at 1017-18, 2171-73. This neuromuscular disease can be acquired or inherited. It is associated with abnormal muscle weakness and fatigability, which is especially noticeable by patients when they do repeated or sustained activity. There are several congenital myasthenic syndromes. *Id.*

15. *Dad Diagnoses*, *supra* note 10. Ethan was accepted into a clinical trial for a new drug at the University of California, Davis, Medical Center, although his success with the use of ephedrine has been great to date. Ethan's sister has not responded as dramatically to ephedrine, but doctors believe that as her nervous system develops, she too will improve. Doctors were extremely impressed with the time and effort Andy Peake invested in researching the symptoms of his children, and they listened to his findings. *Id.*

16. *See* Dr. Jerry Green, *Heal Thyself! Internet and PC Technologies Could Be Just the*

insurance providers, health maintenance organizations, private practice physicians, drug companies,[17] and hospitals to fight furiously for their own piece of the lucrative health care pie.[18] The former Surgeon General of the United States, C. Everett Koop, suggests that the rapidly proliferating leviathan, the primarily for-profit system known as "managed care," which often translates into health-maintenance organizations (HMO's), has changed its focus from the original laudable goals of preventive care and standardization of medical practice to one interested first and foremost in autocratic profit and only secondarily in maintaining health.[19] Thus, with the baby-boomer generation beginning to turn fifty years of age and placing increased demands on our health care system, the aging population may be at the very bottom of the list when the decisions about its care are rendered.[20]

Computers could be just the medicine the doctor ordered! The potential uses of the computer in the health care field are nothing short of phenomenal. Despite the scourge of AIDS, the Ebola virus, cancer, and cholesterol, developed and developing countries have experienced a twenty-five year increase in life expectancy since 1900; historically, that increase is the most rapid improvement ever in world health.[21] One might think the improvement in world life expectancy to be due to newer and better drugs, medical diagnosis, treatment, and surgery.[22] However, this remarkable accomplishment in increased longevity is, according to some commentators, the singular result of the practice of public

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Medicine for Our Ailing Health Care System—and Even for Ourselves, TORONTO STAR, May 1, 1997, at J1 (exploring the uses of search engines as well as specific medical web sites available on-line).

17. *See generally* Barbara J. Tyler & Robert A. Cooper, *Blinded by the Hype: Shifting the Burden When Manufacturers Engage in Direct to Consumer Advertising of Prescription Drugs*, 21 VT. L. REV. 1073 (1997) (discussing at length the use of advertising directed to consumers (DTC) by drug companies for their prescription products). The authors suggest that DTC advertising places a burden on the physician-patient relationship and may result in ill-advised patients demanding inappropriate treatment. *Id.*

18. *See* C. Everett Koop, *Manage with Care*, TIME, Sept. 18, 1996, at 69 (stating that it "may take five or 10 years to find the right balance of managed care, physician autonomy and patient rights"). Former U.S. Surgeon General, C. Everett Koop is currently a professor of surgery at Dartmouth College and the medical director of Time Life Medical, an organization engaged in patient education. *Id.*

19. *Id.* Dr. Koop relates the current trend in which medical decisions are taken entirely away from doctors and patients. He relates the ludicrous tale of physicians who have "devoted a third of their lives to education and training being forced to get permission to do a necessary operation from an insurance clerk [who is] staring at a computer screen at the other end of an 800 number." *Id.*

20. *Id.*

21. *See* E. Boussard et al., *Sentiweb: French Communicable Disease Surveillance on the World Wide Web*, 313 BRIT. MED. J. 1381 (1996) (advocating and applauding the public health professionals who have made the favorable statistics and increased life-span possible).

22. *Id.*

health.[23] In the Twentieth Century, the two most significant developments heralding improved world health are sanitation and immunization.[24] In the next millennium, the new era of public health will begin. Commentators indicate that new era will necessarily include telepreventive medicine.[25]

The benefits of computer use in the field of medicine cannot be overrated because computers can bring specialized, affordable access to any and all patients in every area of the world, even those patients in areas considered extremely remote and underserved.[26] The computer can offer a boon to all by empowering patients and by educating them to work with their physicians to effect better health. Information is power. Thus, computer use in the practice of medicine must be encouraged and expanded.

This Article explores some of the historical background and uses of the computer in the education and support of patients as well as some current World-Wide Web sites available to educate consumers and physicians. While professionals in the field of health are concerned about the sudden proliferation of over 10,000 Internet web sites devoted to health and medical information, the existence of these sites points out that people are intrigued by medical information.[27] The very strength of the Internet lies in the ability of users to freely express their views on any topic, including health care.[28]

Also, this Article focuses on medical malpractice, dividing liability for medical malpractice into several discrete categories: very limited liability for simple patient education, arguably protected by the First Amendment; moderate liability for specialist's consultations and advice; and the potential for serious liability incurred by the actual practice of medicine, diagnosis, and treatment of patients on the Internet. However, this Article recommends adopting limits on

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23. *Id.* Public health is defined in this article as the transfer and exchange of health information. *Id.* Public health professionals perform data collection, do surveillance, transmit information, and communicate with people. *Id.*

24. *Id.*

25. *Id.* The article suggests that telemedicine provides resources for only a small number of patients, allowing the transmission of slides, MRIs or other diagnostics, and facilitating consultation. However, teleprevention information specialists, trained in both public health and telecommunications, could be the backbone of public health in the twenty-first century by monitoring diseases on the worldwide web, improving monitoring and forecasting of disease patterns, and allowing statistical gathering and world-wide access. *Id.*

26. *See generally* Phyllis F. Granade & Jay H. Sanders, *Implementing Telemedicine Nationwide: Analyzing the Legal Issues*, 63 DEF. COUNS. J. 67 (1996) (exploring telemedicine in the advice aspect from long distances focusing on whether a physician-patient relationship exists, as well as licensing and litigation issues, and noting that no legal cases directly address telemedicine).

27. Peter Gorner, *Medicine on the Net: Lifesaving Tips or Twaddle?*, CHI. TRIB., May 18, 1997, at 1 (discussing several tips for the health care Web users, including the advice that the consumer weigh certain factors, such as whether the advice on the Net is timely, accurate, and backed by scientific data).

28. *Id.*

liability for physicians because of the public interest involved in allowing open access to health information and treatment. Finally, in the wake of this burgeoning computer health care industry, the liability issues for standards of care must be resolved, as well as jurisdictional issues regarding which state laws apply to consumer litigation of claims.[29]

Medical malpractice cases that arise from use of the Internet must be decided on a case-by-case basis with courts deciding liability in a fair and uniform manner. To discourage forum shopping, courts should establish jurisdiction in the location in which the physician is licensed for any claims that arise.[30] Thus, it should be presumed that the patient is visiting the physician in his office in the state in which the physician is licensed.[31] Federal licensing is unnecessary under this plan.[32] Board certification by any medical specialty board could be found to provide *prima facie* evidence of federal licensing in any state jurisdiction.[33] Thus, the standards of care of that particular specialty area could be applied to the practitioner.[34] The goal of providing access for the consumer to the best and most educated health care practitioners should be paramount in the framework of Internet health law. The increase in managed care and the limitation of access to health resources demands that patients and their families take responsibility and actively seek information in order to participate in decision making regarding their own treatment.

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29. Issues of legal jurisdiction over World-Wide Web publishing and standards of care for the medical practitioner in differing states or world jurisdictions are not dealt with in depth in this Article. Such issues are instead left for other writers on the subject matter.

30. *See* Granade & Sanders, *supra* note 26, at 72.

31. Stacey Swatek Huie, Note, *Facilitating Telemedicine: Reconciling National Access with State Licensing Laws*, 18 HASTINGS COMM. & ENT. L.J. 377, 404-05 (1996) (citing with approval Jay H. Sanders, *Telemedicine: Challenges to Implementation, in Telemedicine: An Information Highway to Save Lives: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space and Technology*, 103rd Cong. 48 (1994) (statement of Jay H. Sanders, M.D.) [hereinafter Sanders, Telemedical Hearing]). Dr. Jay Sanders is a leading authority, writer and lecturer in the field of telemedicine and has dealt with the issues of jurisdiction and standard of care which will not be addressed in depth in this work. Sanders proposes that state law be interpreted to deem the patient "electronically transported" to the physician rather than the physician transported to the patient. *Id.* at 405. Huie argues that the concept of "electronic transportation" would solve only the problem of unlicensed practice when a patient consults a physician who is in a state in which the physician is licensed. *Id.* While Huie disagrees, this author proposes that it also solves the problem of a physician who is out of his home state when he offers an opinion or consultation. States should, however, rewrite their laws to clearly facilitate telemedicine. *Id.* at 405-06.

32. *Id.*

33. *Id.*

34. *Id.*

I. THE PHYSICIAN-PATIENT RELATIONSHIP

New legal questions arise in the context of telemedicine and the Internet.[35] For example, telemedicine practitioners worry that they will be hailed into court in a remote jurisdiction for rendering advice to distant patients and their primary care physicians.[36] These consulting physicians lack legal guidance because there are no current cases involving telemedical practitioners and malpractice.[37] However, in any action against a physician for medical malpractice, the court allows recovery only where there is a doctor-patient relationship created as a result of a contract, either express or implied.[38] No written contract is necessary, nor is it usual in the medical field. One normally creates an implied contract with a physician as follows: (1) seek out a physician; (2) make an appointment at the office; (3) journey to see the practitioner, as scheduled, and submit to an examination at the office; and (4) furnish consideration in the form of some type of payment. The gravamen of the contractual relationship between physician and patient is that it is a consensual one.[39] Even when the physician has volunteered to serve the patient gratuitously, courts have recognized the creation of a

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35. *See* Granade & Sanders, *supra* note 26. "Telemedicine" is defined as the "use of telecommunications technology to provide health care services to patients who are distant from a physician or other health care provider." *Id.* at 67. Thus, telemedicine has the clinical component of caring for a patient. This care may include use of telephone, fax machine, or more advanced high tech equipment such as audio-visual equipment and high resolution cameras-linked by fiberoptics. *Id.*

See also 3 Experts in Telemedicine Explore Issues Face-to-Face, HOUS. BUS. J., Jan. 24, 1997, *available in* 1997 WL 8297196. One panelist expert in this article, David Norton, Ph.D., who has held conferences on the subject of telemedicine as well as presentations on its use in manned space flight and health care issues, states: "In 20 years, we may not even refer to 'telemedicine.' We'll just call it 'medicine' utilizing multiple telecommunications tools." Another panelist, Robert M. Brecht, Ph.D., president and chief executive officer of International Telemedicine Center Inc., suggests that "tele" needs to be removed from the word "telemedicine" and the industry needs to consider it the way medicine is practiced—a tool in the diagnostic process. *Id.*

36. *See* Granade & Sanders, *supra* note 26, at 67.

37. *Id.*

38. Several cases have discussed the physician-patient relationship in the context of a malpractice claim. *See, e.g.*, Roberts v. Hunter, 426 S.E.2d 797, 799 (S.C. 1993) (establishing the doctor-patient relationship as a prerequisite to a medical malpractice claim); Osborne v. Frazor, 425 S.W.2d 768, 771 (Tenn. Ct. App. 1968) (holding that the voluntary acceptance of the physician-patient relationship by the affected parties creates a prima facie presumption of a contractual relationship); Lopez v. Aziz, 852 S.W.2d 303 (Tex. Ct. App. 1993) (positing that the existence of a duty flowing from physician to patient is the essence of a malpractice claim but finding no physician-patient relationship).

39. *See Roberts*, 426 S.E.2d at 799. *But see* Greenberg v. Perkins, 845 P.2d 530, 531 (Colo. 1993) (holding that when a physician has not undertaken any medical responsibility with respect to examinee except to evaluate and report his opinion on that person's physical condition to another party, no physician-patient relationship exists).

contractual relationship.[40] Conversely, physicians are under no legal obligation to engage in the practice of medicine or accept the treatment of every patient who applies for treatment.[41]

In the context of consulting, a telemedical practitioner—who is usually a specialist in a particular field—is called to consult with the referring physician regarding the patient and to supervise and advise in the patient's diagnosis and treatment.[42] The responsibility and control of the consultants and the role they play in supervising and treating patients is one horn of the liability dilemma. Courts continue to emphasize the necessity for a contractual relationship to exist between doctor and patient before they grant a plaintiff's malpractice cause of action.[43] Where and when these physician-patient relationships are found by the courts, based on the facts in the existing case law, is both enlightening and surprising. As a corollary, absent a special relationship, there is no duty of care owed to third parties who are not contemplated in the contractual setting.[44] Those courts failing to find any special relationship tend to focus repeatedly on the amount of control exerted over the patient by a physician, as well as the

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40. Young v. Crescente, 39 A.2d 449 (N.J. 1944).

41. Various courts have held that no duty exists for any physician to accept a patient. *See, e.g.*, Oliver v. Brock, 342 So. 2d 1, 3 (Ala. 1976); Hiser v. Randolph, 617 P.2d 774, 776 (Ariz. Ct. App. 1980); Buttersworth v. Swint, 186 S.E. 770, 772 (Ga. Ct. App. 1936); Childers v. Frye, 158 S.E. 744, 746 (N.C. 1931); Childs v. Weis, 440 S.W.2d 104, 106-07 (Tex. App. 1969); Lyons v. Grether, 239 S.E.2d 103, 105 (Va. 1977) (no duty absent statute); Miller v. Dumon, 64 P. 804, 806 (Wash. 1901) (stating that any physician may absolutely refuse employment). *See also* Violandi v. New York, 584 N.Y.S.2d 842, 843 (N.Y. App. Div. 1992) (holding where an examination is conducted of a police officer, solely for the purposes of the employer, police department, there must be something more than a mere examination to establish the physician-patient contract, even when the exam resulted in a misdiagnosis reported to the employer).

42. *See* Granade & Sanders, *supra* note 26.

43. *See supra* note 38 and accompanying text.

44. Various courts have found a duty to third parties by virtue of a special relationship. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342-43 (Cal. 1976) (holding a psychotherapist employed by the university had a duty to warn an intended victim who was ultimately killed at the hands of his patient); Reisner v. Regents of the Univ. of Cal., 37 Cal. Rptr.2d 518 (Cal. Ct. App. 1995) (holding a physician owed a duty to the patient's boyfriend to warn the patient or her parents that the blood used in a transfusion during her surgery when she was twelve years old was contaminated with HIV virus); Pate v. Threlkel, 661 So. 2d 278, 279 (Fla. 1995) (holding that a physician who owed a duty to a patient to warn the patient of the genetically transferable nature of medullary thyroid carcinoma, also owed to the patient's children the duty to warn the patient so the children could be warned before they too contracted the disease); DiMarco v. Lynch Homes-Chester County, Inc., 583 A.2d 422, 424-25 (Pa. 1990) (holding a physician owed a duty of care to the sexual partner of a blood technician who contracted hepatitis while drawing a blood sample and was not warned to refrain from sexual relations with her partner who ultimately contracted hepatitis); Dudley v. Offender Aid & Restoration of Richmond, Inc., 401 S.E.2d 878, 879 (Va. 1991) (holding the private operator of a halfway house had a duty to control a felon so as to prevent him from causing harm by raping and murdering the victim).

unwarranted public policy of intolerably extending the duty of care owed.[45]

The following sections of this Article will examine three differing degrees of risk engendered by the diverse tasks undertaken by medical web sites and practitioners on the Internet. There are minimal malpractice liability and extremely important public policy concerns favoring educating patients about disease and treatment on the Internet. A more questionable middle ground of risk is involved in conferencing, second opinions, and telemedicine, precisely because of the lack of contractual relationship or control of the contacted specialist over the outcome.[46] However, despite the risk, telemedicine saves money, it continues to grow, and it is here to stay.[47] The highest and most obvious medical-legal risk comes with the creation of World-Wide Web sites by physicians and the actual practice of medicine by these practitioners on the Internet. This practice of no-touch medicine is happening and should present a serious concern to all those involved in medical ethics, health care delivery systems, and quality patient care.

II. LOW LEGAL LIABILITY: EDUCATING AND PROVIDING SUPPORT

> "Knowledge is of two kinds. We know a subject ourselves, or we know where we can find information upon it."—Samuel Johnson

Bruce Binder, a forty-eight-year-old computer consultant from Redondo

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45. Various courts have found no duty to third parties. *See, e.g.*, Pittman v. Upjohn Co., 890 S.W.2d 425, 435 (Tenn. 1994) (holding a physician and pharmacy owed no duty to the adult grandson of a woman who took the woman's Micronase—a drug that causes lowering of blood sugar—mistakenly thinking it was aspirin); Nasser v. Parker, 455 S.E.2d 502, 506 (Va. 1995) (holding a doctor and hospital had no duty to warn an intended victim, who was ultimately killed, that her assailant had been released from the hospital, because there was no control of the patient and no special relationship); Fox v. Custis, 372 S.E.2d 373, 376 (Va. 1988) (holding a parole officer did not "take charge" or "exercise control" over a parolee who murdered one person, committed arson, and abducted, beat, and set a woman on fire).

46. "Telemedicine is hampered by a lack of reliable comparisons between its benefits and costs and other options," states a committee report by the Institute of Medicine Committee, U.S. Dep't of Health and Human Services. *Telemedicine Needs Better Evaluation*, 112 PUB. HEALTH REP. 5 (1997). To date, very few applications of telemedicine have been approved for payment by the Health Care Financing Administration with the exception of teleradiology (transmission of x-rays over distances) which is reimbursed by Medicare and other third party payers. *Id.* The authors hint that because the use of telemedicine may impact staffing levels, many clinicians see its use as an economic threat to their livelihoods. The commentators also cite problems with legal issues such as minimum standards, licensure, liability, and regulation of hardware and software. *Id.*

47. *See* Jim Montague, *Technology*, 70 HOSPITALS 12-21 (1996) (reporting that telemedicine is expected to grow by $100 billion in the next five years). The author discusses the U.S. TELEMEDICINE MARKET REPORT, which lists over 100 companies that provide products and services and is available for order ((800) 927-8071). The author explains that telemedicine used in Iowa has enabled 13 hospitals to join a consortium, making it one of the nation's largest telemedicine networks in the country. These hospitals can transmit diagnostic images for interpretation by radiologists, pathologists, and others, as well as diagnose, treat, and manage patient care. *Id.*

Beach, California, was diagnosed with prostate cancer in 1993.[48] Binder's physician gave him two accepted treatment modalities; he could agree to have radical prostate surgery or he could submit to radiation treatments.[49] Without treatment, Binder knew he would die. But with this treatment, Binder believed he might as well be dead because he could either be left incontinent, sexually dysfunctional, or both.[50] Someone told Binder that the Internet, more particularly Compuserve, had an on-line cancer forum which posted bulletin board messages. Binder logged on and made an inquiry about prostate treatments. The very same day he got his first responses to his inquiry.[51] Binder chose to have cryosurgery, a then little-known procedure in which cancer cells were exposed to sub-freezing temperatures and destroyed.[52] Three years later, he was still cancer free.[53] The Internet educates.

Portia Iverson had become obsessed with finding out information about autism since her son, Dov, had been diagnosed with it at twenty-one months of age.[54] She perused web sites on the computer looking for information.[55] Information on the best research studies being done in the field of autism was lacking.[56] So Portia, with the help of her husband, has co-founded a new web site where users can now get the latest information on research studies and grant proposals, as well as be linked to autism newsgroups.[57] Parent created sites go far beyond the usual fare offered in parenting magazines. These web sites create a forum for parents to connect to one another and offer information and support to those who live in remote areas or have children with rare diseases.[58] Parents

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48. Elizabeth M. Cosin, *Surfing Web to Save Lives: Patients Join Net Community to Learn About Latest Research and Seek Support They Need*, L.A. DAILY NEWS, Oct. 28, 1996, at L3. Included in this article is the story of June Sherman, who one day typed "dysautonomia" into her Internet search engine. She did not think she would find anything about the rare disease, which affects less than 100 know people worldwide. However, she found support group listings and help, including up-to-date research findings. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* (explaining that Binder and his wife Elena sifted through more than 400 pages of old messages and postings, and indicating that Binder received much feedback from prostate patients who had undergone the usual surgery and/or radiation, but were not pleased with the results).

52. *Id.*

53. *Id.*

54. Carla Koehl, *Finding a Web of Support*, NEWSWEEK, Mar. 22, 1997, at 50. This article discusses the veritable wealth of support available via the Internet for both rare and common adult and childhood disease processes that affect individuals.

55. *Id.*

56. *Id.*

57. *Id.* Dov was three and a half in 1995, when Portia and her husband created the "Cure Autism Now" web site, which can be located at the following internet address: <http://www.canfoundation.org/>.

58. As previously stated at note 3, the Internet is in a constant state of change, so accuracy and existence of these cites is not guaranteed to be accurate at the time of publication.

and organizations have expanded the availability of specialized web sites.[59] The World-Wide Web sites range in subject treatment from well-known processes like Down syndrome,[60] cerebral palsy,[61] and sickle cell anemia[62] to rare diseases like Sturge-Weber syndrome[63] and Infantile Refsum's disease.[64]

There is no doubt that consumers must take a more active role in their own health care. The Internet has revolutionized the delivery of health information to consumers. With a few caveats, the computer can certainly help in medical problem solving.[65] The necessity for information for one's diagnosis or medical options has never been more obvious than now when consumers are faced with government and medicare funding cutbacks, hospital closings, waiting lists for surgical procedures, and doctors' and nurses' strikes.[66]

Name any affliction or disease and chances are you will find at least one web site dedicated to informing the world about it.[67] If one goes to the World-Wide Web for medical information, it is essential to check out the credentials of the offered site.[68] Physicians are encouraged to utilize the Internet to educate

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59. Koehl, *supra* note 54. A site devoted to rare genetic diseases in children, located at <http://mcrcr4.med.nyu.edu/~murphp01/homenew.htm>, is maintained by staffers at the New York University Medical Center. WellnessWeb, located at <http://wellweb.com/index.htm>, is designed to pay close attention to issues like treatment options, drug dosages, and physician selection . The site won a 1996 Best Site of the Year award from *Net Magazine*. Another interesting site is one maintained by the National Institutes of Health, located at <http://www.nih.gov>, where simply typing "childhood" into the search engine field pulls up dozens of links to very specialized research studies including recent papers on acute lymphocytic leukemia. *Id.*

60. *Downs Syndrome* (visited June 28, 1997) <http://www.epix.net~/mcross/down-syn.html>.

61. Julio Ciamarra, *Internet Resources for Special Children* (visited June 27, 1997) <http://www.irsc.org/>.

62. *Sickle Cell Anemia* (visited June 27, 1997) <http://wellweb.com/index/qsickle.htm>.

63. *Sturge Weber Syndrome* (visited Mar. 27, 1998) <http://www.avenza.com/~swf/aboutsws.htm>; *see* TABER'S, *supra* note 3, at 1850.

64. *Infantile Refsum's Disorder* (visited June 27, 1997) <http://www.pacifier.com/~mstephe/>; *see* TABER'S, *supra* note 3, at 1652.

65. *See* Green, *supra* note 16.

66. *Id.*

67. *See generally* Robert J. Hawkins, *Here's to Your Good Health and Fitness*, SAN DIEGO UNION & TRIB., June 18, 1996, at 1. This article explores many web sites that educate the consumer.

68. See LUIS G. PARERAS, M.D., INTERNET: MEDICINE AND THE INTERNET (1996), for a book that provides physicians with a very detailed and practical guide to using the Internet as a medical reference. The author provides easy to understand guidance to accessing medical information from choosing a server to suggested educational uses. The book is organized by topic and includes Experimental Organ Preservation, The Virtual Hospital, Surgery, and Radiological Anatomy Project. Many of these sites are interactive. *See* Book Review, 22 AM. J.L. & MED. 577 (1996) (giving a comprehensive review to the above book).

themselves and update their knowledge and skills.[69] The discerning consumer must look for web sites that are affiliated with reputable organizations or with academic institutions. There is something for everyone: from learning about AIDS and addiction to virtual bodies of men and women for learning anatomy.[70]

A. First Amendment Protection for Internet Expression

Legal liability for producers of information provided to consumers on such medical information web sites is not likely, nor should it be.[71] As technology advances, the electronic word has supplanted the printed word as the most prolific method of communication in our society.[72] The Internet provides however, an unusual source of a legal dilemma. Commentators have indicated that, in using the Internet, all users of the Internet are also potential producers.[73] The roles in the radical landscape of cyberspace are infinitely interchangeable.[74] One can sign on to the Internet intending only to receive information from a web site and instead produce information by answering a question or participating in a chat forum. This convergence of the roles of user-supplier has significant implications for the nature of legal regulation.[75]

The First Amendment was designed to protect speech no matter what the medium.[76] The danger with First Amendment analysis lurks in the probability that the Internet will be treated differently by the courts because of its newness and its use of technology. Such different treatment by the courts could serve to further obfuscate free speech and expression laws. The Internet and cyberspace are new types of forums. If courts treat them as public forums, then signing on will be like speaking on the town square, and users of the square will be expected to deal with the wide array of speech from political to offensive that takes place

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69. *Id.*

70. *Id.* There are also web sites for cancer, cardiology (I &II), diabetes, healthy living, heart disease, diet, stroke, and mental health. Thousands of sites exist for every known health concern.

71. *See, e.g.*, Philip H. Miller, Note, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147, 1190-91 (1993) (arguing that computer electronic information services are analogous to print medium and thus granting a very high level of constitutional protection to the new model of computer or Internet communication, and citing City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("[T]he Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis.")).

72. See Note, *supra* note 4, for an in depth and cogent analysis of the more pressing issues in new electronic media technology.

73. See Perritt, *supra* note 4, for an in depth discussion of the current computer technology and the role it plays in the legal landscape.

74. *Id.* at 51.

75. *Id.* at 56.

76. *See* Note, *supra* note 4, at 1063.

there.[77] Typically, the Supreme Court has created a hierarchy of protections for the media; speech and the print medium reigns supreme in the First Amendment arena and lesser protection has been granted to newer emerging electronic communications.[78] The level of protection granted to speech usually depends upon the content of the speech involved.[79] The Internet is communication and the First Amendment at its best and worst. Technological characteristics should not be the crucial factor in determining whether a message receives First Amendment protection. [80] First Amendment analysis should focus, not on the media, but only on the characteristics or type of speech involved.[81] Charlatans, alternative healers, hucksters, and quacks are all on-line and available twenty-four hours a day. It is incumbent on the user of the medium to get second and third opinions from the resources available.[82]

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77. See *id.* at 1094, for a comprehensive discussion of the balance between a speaker's rights and a listener's privacy interests as well as forum and content based First Amendment analysis on the Internet.

78. *Id.* at 1062 (citing FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.")).

79. Thus, obscenity, non-obscene child pornography, and defamatory speech and "fighting words" receive lesser (or no) First Amendment protection because of the content of the speech regardless of the media through which they are published. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 930 (2d ed. 1988). Recently, commercial speech has been granted significant protection from the United States Supreme Court as long as the advertising is true and non-deceptive. *See* 44 Liquormart v. Rhode Island, 116 S. Ct. 1495 (1996) (holding that a state ban on advertising of retail liquor prices was unconstitutional because it did not advance the state's interest in promoting temperance). Over 20 years ago, the Court held in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), that the state's blanket ban on advertising the price of prescription drugs violated the First Amendment.

80. *See* Note, *supra* note 4 at 1063 & n.7 (citing Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier, Keynote Address at the First Conference on Computers, Freedom and Privacy* (March 26, 1991) (on file with the Harvard Law School Library) ("[T]he Constitution's norms, at their deepest level, must be invariant under merely technological transformations.")).

81. *Id.*

82. *See generally* Gorner, *supra* note 27. Knowledgeable commentators suggest that the most reliable web sites are those linked to professional organizations. For example, the American Medical Association has an award-winning web site (<http://www.ama-assn.org>) that features its diverse publications and contains a database of 650,00 physicians. The National Library of Medicine has a catalog of journal articles on-line on MEDLINE. This site address is <http://www.nlm.nih.com> and it requires a credit card number to receive a user I.D. *See* THE MERCK MANUAL, *supra* note 3 (defining and covering virtually every known human illness in layman's terms).

Consumers are using the Top 200 prescriptions site (<http://rxlist.com>) to check out the drug's action, dosage, and possible interaction with other drugs. This is a free service that provides more information with mention to on-line discussion groups and other popular sites.

B. The Written Disclaimer

The recent proliferation of thousands of medically focused web sites is nothing short of phenomenal. Each source typically has some sort of disclaimer of liability. Some sites have an ever-changing topic such as "disease of the week."[83] Following such a web site is often a short disclaimer which indicates the purpose of the site is to educate and that one's own physician should be consulted for medical problems.[84]

One interesting web site named *America's Housecall Network* presents information in summary form in scores of categories of interest and provides a two paragraph disclaimer in which common-law warranties are excluded and damages are limited to only those damages equal to charges paid in fees by the user for the acquired information.[85] Disclaimers also adorn the web site run by

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83. *See, e.g., Ask Dr. Weil* (visited June 20, 1997) <http://www.drweil.com>. This intensely amusing and colorful web site offers advice, menus, a chat room and a home page as well as the opportunity to purchase a cook book. *Id.* The "Disease of the Week" feature provides homeopathic advice that ranges from kidney stones to chronic sinusitis.

84. *Id.* This site, which is updated on a weekly basis, adds a new disease each week or so. The following disclaimer is provided by Dr. Weil:

"*Disclaimer*: All material provided in the Ask Dr. Weil program . . . is provided for educational purposes only. Consult your own physician regarding the applicability of any opinions or recommendations with respect to your symptoms or medical condition." *Id.*

85. *See Health Answers* (visited June 20, 1997) <http://www.healthanswers.com>. This site contains the following disclaimer:

> Information accessed through HealthAnswers is presented in summary form in order to impart general information relating to certain diseases, ailments, physical conditions and their treatments. Such information is not complete and should not be used as a substitute for a consultation or visit with your physician or other health care provider. Information accessed through HealthAnswers is not exhaustive and does not cover all diseases, ailments, physical conditions or their treatments. HealthAnswers makes no warranty as to the information's completeness, reliability or accuracy. Should you have any health care related questions please see your physician or other health care provider promptly.
>
> Information accessed through HealthAnswers is provided "AS IS" and without warranty, express or implied. All implied warranties of merchantability and fitness for a particular use or purpose are hereby excluded. HealthAnswers's liability, if any, for damages (including, without limitation, liability arising out of contract, negligence, strict liability, tort or patent or copyright infringement) shall not exceed the fees paid to HealthAnswers by the user for the particular information or service provided. HealthAnswers shall not be liable under any theory of indemnity. In no event shall HealthAnswers be liable for any damages other than the amount referred to above, and all other damages, direct or indirect, special, incidental, consequential or punitive, are hereby excluded even if HealthAnswers has been advised of the possibility of such

a New Jersey ear, nose and throat osteopath.[86] The picture greeting the web site visitor of *Virtual Doctor* shows a male physician with a nurse next to him attending to an ill patient, attached to tubing, who is supposedly on a ventilator.[87] This site offers on-line advice on any medical topic for $9.95.[88] However, the web site does not provide information about the qualifications of the adviser.[89]

A seachange in access to medical information has occurred. Information on any conceivable medical subject is available on the Internet twenty-four hours a day. For the luxury of accessibility of information, which is largely unregulated, users must not be naive but must educate themselves to quality sites or become vulnerable to quacks and the unlicensed.[90]

C. Regulation of Internet Fraud and Abuse

Many of the medical information sites found on the Internet are not purely altruistic ventures but are located on the Internet primarily to advertise and sell products.[91] Advertising on the Internet has become a burgeoning industry.[92] Its lure is that it is highly cost-effective since, once a site is created, it may reach millions of consumers both nationally and internationally. Sources indicate that advertisers spent $74 million on Internet advertising in 1996 alone.[93] Advertising first appeared on the Internet in the guise of corporate or individual home pages

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damages.

Id.

86. *See Virtual Doctor* (visited June 9, 1997) <http://www.netvent.com/Doctor/consultl.html>.

87. *Id.*

88. *Id.*

89. *Id.* The doctor that runs this web site is a New Jersey osteopath. He provides the user no information about his qualifications or medical credentials, unlike other web sites which do. *See Cyberdocs*, *infra* note 166. Ironically, the heading on the web site following the name of the doctor, Dr. John Brandeisky, which should say "Virtual Doctor Consultation Form" erroneously says "Virtual Doctor Consulatation [sic] Form." One must wonder how valuable the advice will be that is given for the price of only $9.95 and when "consultation" is misspelled. The several pages of forms that follow ask for symptoms and request your name, address, and a Visa or Mastercard number.

90. *See* Jan Greene, *Sign on and Say 'AH-H-H-H-H,'* 71 HOSPS. & HEALTH NETWORKS, April 20, 1997, at 45-46 (discussing the new concept of practicing medicine on the Internet a huge leap of malpractice liability from telemedicine).

91. Such products range from books and tapes to cookbooks of low fat meals. Entering your Visa or Mastercard number can get a product sent to your home in short order. Most sites encrypt your credit card number so hackers or others cannot intercept the credit card number and use it.

92. *See* Greene, *supra* note 90.

93. *See* Richard Raysman & Peter Brown, *Regulating Internet Advertising*, N.Y.L.J., May 14, 1996, at 3 (col. 1) (providing a comprehensive overview of the problems in advertising and technology as well as some insight into the very few litigated cases in the area of Internet fraud and abuse).

which contained product information and sometimes allowed direct ordering on-line.[94]

Federal regulations regarding Internet advertising have not yet been developed.[95] The use of the Internet to transmit ads containing fraudulent claims or consumer "scams" is an area of growing concern for both federal and state authorities.[96] Fraud and abuse in the health care industry is aggressively investigated by a variety of government agencies and is estimated to cost taxpayers over $100 billion per year.[97] Thus, advertising on the Internet could present a new and more difficult role to the FTC and possibly other government agencies as well. However, in the interim, the FTC regulates unfair competition in the marketplace, including unfair or deceptive practices, regardless of location, when a consumer has been injured.[98]

Charges have been brought by the FTC against several companies that market their products over the Internet.[99] While some of these cases simply have

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94. *Id.*

95. The Internet is a very hospitable environment for those who wish to commit computer or other types of fraud. Federal law does exist to punish computer fraud. Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (1994). Several cases address this section. *See, e.g.*, United States v. Sablan, 92 F.3d 865 (9th Cir. 1996) (holding the federal statute is not unconstitutional simply because there is no *mens rea* requirement for the damages element of the offense). *See also* United States v. Morris, 928 F.2d 504 (2d Cir. 1991) (holding that a computer transmission of a "worm" into a group of networks that connected university and other computers around the country and which obtained some limited information about users was an illegal act under the statute); Sawyer v. Department of Air Force, 31 M.S.P.R. 193 (1986) (a case from the Merit Systems Protection Board holding an employee who altered computer contracts and claimed it was only to indicate lack of safety provisions was guilty of a crime of use of a government computer for unauthorized purposes). *But see* State v. Azar, 539 So. 2d 1222 (La. 1989) (holding a state constructed computer fraud statute was unconstitutionally vague in part because of the phrase which prohibited the obtaining of money "through alteration, deletion, or insertion of programs or data").

96. *Id.*

97. *See* W. Eugene Basanta et al., *Recent Developments in Medicine and Law*, 31 TORT & INS. L.J. 357, 365 (1996) (stating that the Department of Justice, FBI, Department of Health and Human Services and Office of the Inspector General have had to aggressively investigate this fraud). The Justice Department diverted 10% of its financial resources to prosecuting health care fraud. In 1994, the FBI spent $37 million fighting health care fraud and collected more than $500 million in fines and assessments. *Id.*

98. *See* The Federal Trade Commission Act, 15 U.S.C. § 45 (1994) (granting the power to the FTC to pursue a variety of civil and criminal actions against those who engage in proscribed advertising practices).

99. *See* Raysman & Brown, *supra* note 93. This article indicates that in 1996, the FTC charged nine companies with making false or unsubstantiated claims. In Illinois federal court, in a case brought against U.S. Telemedia, No. CIV.A.96-C-1440 (N.D. Ill. March 13, 1996), the FTC alleged that the defendant would advertise and require payment in advance by telephone or e-mail, and the items ordered were not received and consumers could not obtain refunds. Thus the complaint was brought under the FTC's Mail or Telephone-order Merchandise Rule, 16 C.F.R. §

to do with a consumer's inability to receive the merchandise or a refund, others are much more disturbing in character.[100]

One case with a factual scenario that cried out for redress by the court is *Massachusetts v. Phillips*.[101] The defendant, Marjorie Phillips, through her company, New Discoveries, provided medical treatment information on the Web and advertised the availability of a treatment for HIV which would allegedly cure the disease in six weeks.[102] The posted advertisement on the World-Wide Web read, "In Six Weeks You Are HIV Negative."[103] The advertisement alleged that the use of the combined spices of cloves, wormwood and black walnut hull would cure the virus.[104] If that treatment was unsatisfactory, an informational book was sold for twelve dollars which used a procedure called "SynchroZap," which entailed using a nine-volt battery to eliminate the "parasite" which an unknown Dr. Clark stated was the cause of the AIDS virus.[105] In addition, a 900 telephone number was presented to the users of the web site to be used at the additional cost of $1.99 per-minute.[106] The Massachusetts Attorney General brought the claim against Phillips and was successful in getting a temporary restraining order issued against the site.[107] These egregious and duplicitous transactions that prey on the naive and desperate are precisely the type that should be avoided.

Although some psychiatrists and psychologists have begun charging for on-line services,[108] hundreds of other doctors are providing free services, practicing medicine in a more informal manner or taking money from on-line service providers to offer health advice in forums on America Online and Prodigy.[109] Unfortunately, even Prodigy's holistic health bulletin board was duped by a physician who answered questions on-line and who had lost his medical license.[110] This trend of practicing medicine on the Internet has medical officials

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435 (1996), which requires that sellers offer buyers the option to cancel an order or receive a credit or refund if the order is not received within a certain amount of time.

100. *Id.*

101. No. CIV.A.96-00661, slip op. (Mass. Super. Ct. April 2, 1996), *cited in* Raysman & Brown, *supra* note 93. The Attorney General of Massachusetts brought an action requesting a Temporary Restraining Order against the defendant under Massachusetts Consumer Protection Act, MASS. GEN. LAWS ch. 93 A § 2 (a) (1996).

102. *See id.* HIV is the acronym for, Human Immunosuppression Virus, the virus that causes the disease known as AIDS, Acquired Immune Deficiency Syndrome.

103. *Id.*

104. *Id.*

105. *Id.*

106. *See* Raysman & Brown, *supra* note 93 and text of the trial level case.

107. *Id.*

108. *See Quacks, Bogus Treatments Infect the Internet*, SAN ANTONIO EXPRESS NEWS, Oct. 21, 1996.

109. *Id.*

110. *Id.* Walter Stoll worked for Prodigy and held himself out to be a doctor for two years before they realized his license was lifted, after which they removed him from the bulletin board

vacillating from incredulous to infuriated.[111] Even the experts cannot agree as to what constitutes the practice of medicine on-line.[112]

Lastly, liability has been discussed for the publishers of these medical cites that are used fraudulently or illegally.[113] In theory, an Internet Services Provider—such as America On-Line or Prodigy—could be held liable for knowingly permitting its facilities to be used to transmit an ad which contains false or fraudulent material.[114] However, the Communications Decency Act of 1996 contains defenses in the form of "good samaritan" provisions which exclude Internet service providers from liability for information that travels from the Internet through their systems, possibly because of the inestimable benefits of the Internet in general.[115]

Thus, the offering of general medical advice and judgments on-line does not appear to create a formal physician-patient relationship.[116] Nor does it appear that giving such generic advice will tend to generate liability for either the provider or publisher.[117] If however, the provider is producing fraudulent information, advertising bogus or quack cures and soliciting money over the Internet, then courts do have the authority under both state and federal computer

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and dropped his free membership. Apparently his license was taken because of his support for alternative and holistic therapies. *Id.*

111. *Id.*

112. *Id.* Dr. Thomas Monahan, executive secretary for the New York State Board of Medicine, which licenses doctors under the Education Department, says in respect to what constitutes the practice of medicine on the Internet, "The real answer is, we don't know." *Id.*

113. Publishers, also known as Internet Services Providers (ISPs) are those information services like AOL and Prodigy which, for a monthly fee from the user, allow the posting of information on the web sites the providers have created.

114. *See* Communications Decency Act of 1996, 47 U.S.C. § 223 (creating penalties for the transmission or display of obscene, indecent or patently offensive materials to minors via any type of interactive computer services).

Factually analogous cases exist in the print medium. *See, e.g.*, Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992) (upholding a jury award of more than $4 million to the family of a murder victim because the reasonably prudent publisher should not have run an ad by a mercenary who advertised as a "gun for hire" in the magazine and did kill the victim). *But see* Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830, 838 (5th Cir. 1989) (holding a lower court erroneously imposed too high a standard on the magazine and that the magazine could only be held liable if: (1) the activity advertised was clearly illegal; and (2) if a reasonable publisher would conclude that the activity advertised could reasonably be interpreted as a offer to commit a crime).

115. Communications Decency Act of 1996, 47 U.S.C. § 223.

116. *See* Kenneth A. De Ville, *Internet Listservers and Pediatrics*, PEDIATRICS, Sept. 1, 1996, at 453.

117. *Id.* (pointing out that the requirements of the physician-patient relationship require a "legally recognized duty, the breach of that duty and a causal connection between the defendant's breach of duty and the damage incurred by the plaintiff").

or consumer statutes to stop the activity.[118]

III. MODERATE LEGAL LIABILITY: TELEMEDICINE

Telemedicine is no longer an experiment. It is a necessity which provides a boon to mankind.[119] Proponents of its use are making steady progress in acquiring converts.[120] "Telemedicine" is defined as the use of telecommunications technology to provide health care services to patients who are at a distance from a physician or other health care provider.[121] One-fourth of the nation's health care providers are currently utilizing telemedicine at their institutions, and experts suggest that the remaining seventy-five percent must join them or get left behind.[122] Although the equipment can be costly and difficult to use and regulatory obstacles can be problematic, physician-patient video consultations grew by 300% from 1994 to 1995.[123] One barrier to the practice of telemedicine is that many physicians, fearing the economic harm from competition are against it.[124] However, diagnostics such as magnetic resonance imaging (MRI) have revolutionized health care. Telemedicine is the next effective, accessible, economical and logical step in consulting.[125] The changing

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118. *See supra* notes 93-96.

119. *See generally* Bill Siwicki, *Legal Issues Could Slow Growth*, HEALTH DATA MGMT., Apr. 19, 1997 (providing a general discussion of the uses and efficacy of telemedicine as well as advocating laws to permit physicians to consult with other physicians in other states). This article and section focuses on the actual consultation done by professionals on-line-through telephone or other hook-ups. It does not refer to mere conversations or Internet discussions or informal exchanges but, instead, discussions involving actual specific patients to whom the practitioner has undertaken a duty to disseminate a valid professional judgment. *Id.*

120. *Id.*

121. *See* Granade & Sanders, *supra* note 26.

122. *See* Sandy Campbell, *Will Telemedicine Become as Common as the Stethoscope?*, HEALTH CARE STRATEGIC MGMT., Apr. 1, 1997, at 4. A national survey of 95% of the nation's rural hospitals by Abt Associates released in 1996 indicated that 29% of the nation's rural hospitals already practiced telemedicine or plan to have programs up and running within the year. *See, e.g.*, Robert Pendrak & Peter Ericson, *Telemedicine and the Law*, HEALTHCARE FIN. MGMT., Dec. 1, 1996, at 12.

123. *See* Greg Borzo, *Telemedicine: New Tools, Not New Medicine*, AM. MED. NEWS, Nov. 11, 1996, at 42, *available in* 1996 WL 11860504. Statistics gathered by an annual survey conducted by *Telemedicine Today* indicated that 1993, in the first year the survey was done, 1750 consultations took place. In 1994, there were 2110 consultations. In 1995, there were 6267, a growth of 300%.

124. *Id.*

125. *See A Bridge to Russia*, HEALTH DATA MGMT., Jan. 19, 1997 (discussing the telemedical link pioneered by Dr. Earl W. Ferguson to create a World-Wide Web care site that would link clinicians and capture audio and video in real time to allow consults and store expert opinions for colleagues to access). Telemedicine transfers digital data from diagnostic equipment, visual and voice data. As technological support expands, so will the uses. *See* Douglas Bradham et al., *The*

face of medicine which necessitates an increased demand to lower health care costs cannot help but serve as the impetus for telemedicine services.[126] In addition, problems of unequal treatment of rural and urban patients can be dealt with using telemedicine as a conduit to deliver these services.[127] Typical company equipment available in today's marketplace allows doctors to see 3-D images of magnetic resonance imaging (MRI), CAT scans and x-rays.[128] Furthermore, interactive equipment now permits physicians to rehearse procedures using simulator-type equipment to locate positions within the body as well as to practice surgical techniques.[129] Medical commentators suggest that teleconferencing will burgeon as the Internet and World-Wide Web become more accessible on the home computer.[130] The available technology, through the use

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Information Superhighway and Telemedicine: Applications, Status and Issues, 30 WAKE FOREST L. REV. 145, 152-160 (1995) (chronicling the development of telemedicine projects from teleradiology to consulting in different states, hospitals and University Medical Centers from 1991-1995).

126. *See* Mike Mills, *Venture Puts Health Care on Call*, WASH. POST, Mar. 25, 1996. The article reporter interviewed Neal Kassell, M.D., a renowned brain surgeon at the University of Virginia. In 1993, Dr. Kassell linked 19 Virginia hospitals via telemedicine, founded Multimedia Medical Systems—which offers 3-D imaging services—and inspired MCI Communication Corporation to invest in the venture with millions of dollars. Kassell states in the article, "The regulatory issues [with telemedicine] are going to disappear very quickly because telemedicine exists today whenever I'm talking to a patient on the telephone. The only difference now is I can see the patient, he said." *Id.*

127. *See* Daniel McCarthy, *The Virtual Health Economy: Telemedicine and the Supply of Primary Care Physicians in Rural America*, 21 AM. J.L. & MED. 111 (1995) (defining the problems of rural access to medicine and presenting an overview of technology, and reflecting upon the failures of the government to increase the supply of rural practitioners).

128. *See* Mills, *supra* note 126.

129. *Id.* One System known as Multimedia Medical Systems' basic product is $50,000. It allows video-conferencing in one location and transmits live or recorded medical images to another location. In addition, doctors can use the equipment to plan and rehearse procedures. Dr. Kassell, a renowned neurosurgeon discussed the following concern:

> Image-guided technology dramatically decreases the time I spend in surgery. Half the time I spend in surgery is separating normal [brain tissue] from abnormal and finding out where I am. It's not a satisfying experience to remove what you thought was part of a tumor and instead you've removed memories from 1980 to 1985.

Id.

130. Marshall Ruffin, *The Future is Here*, PHYSICIAN EXECUTIVE, Nov. 1, 1996, at 11. The article advocates that all physicians become technology literate or suffer the economic consequences when the public learns to expect such services as video conferencing and answering patients' questions and concerns from the patients' homes. The author points out that this service will be economical. "[B]y adhering to Web standards, hospitals and physicians will be able to participate with patients in video teleconferences without having to pay for, install, or maintain proprietary equipment on patients' PCS." *Id.* The American consumer expects on-line banking, shopping and other activities and so too, like the abundance of ATMs, the growth in demands will

of multiplexed phone lines which project audio and video, provides excellent resolution in the transmission of x-ray and other more complicated test data. Physicians have always communicated with their patients and with each other via telephone. However, there are no current large-scale studies available to demonstrate that telemedicine is as safe and effective as in-person treatment by a physician.[131] One recent small scale study of only thirty patients with dermatologic (skin) problems conducted by the Medical College of Georgia found no difference between the diagnoses physicians made using a telecommunication link and those diagnoses they made in person.[132]

As the use of telemedicine is expanding, questions regarding medical malpractice claims must be addressed. Medical malpractice claims arise where a physician-patient relationship has been established which places a duty on the physician to exercise reasonable care in treating the patient.[133] The existence of a physician-patient relationship is normally a question of fact for the jury to decide.[134] Telephone "discussion between professional people of hypothetical situations cannot be viewed as a basis for liability."[135]

Courts have generally been unwilling to extend liability to consultants. Thus,

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soon require physicians' offices to have health home and office conferencing or business will be lost. *Id.*; *see also* Marshall Ruffin, *The World Wide Web is Coming Soon to an Organization Near You*, PHYSICIAN EXECUTIVE, Mar. 1, 1996, at 3. The article states that the growth areas in Internet use for a physician are both internal and external. *Id.* Internally, a physician can receive and protect secure communications within the organization. *Id.* Externally, a physician can communicate with other health care providers. *Id.* Additionally, the physician may contact insurers, patients and the general public. *Id.*

131. *See* Bradham et al., *supra* note 125, at 164. The article states that Medicare requires that a physician be present at both ends of a consultation in order to bill the government. The Telemedicine Center at the College of Georgia was the first medical center in the country to receive approval for Medicare and Medicaid reimbursement for telemedicine. *Id.* (citing Rita Shoor, *Long Distance Medicine*, BUS. & HEALTH, June 1994, at 39-40).

132. *See* Pendrak & Ericson, *supra* note 122.

133. *See* Oliver v. Brock, 342 So. 2d 1 (Ala. 1976); Flynn v. Bausch, 469 N.W.2d 125 (Neb. 1991). *But see* Davis v. Weiskopf, 439 N.E.2d 60 (Ill. App. Ct. 1982) (physician-patient relationship is not a pre-requisite for medical malpractice when the claim can be grounded in mere negligence).

134. *See Oliver*, 342 So. 2d at 3. During the course of a telephone conversation with defendant Dr. Brock, Dr Whitfield, the treating physician, described generally the type of treatment he was administering to a patient who had been injured in an automobile accident. The court found the trial court's granting of the defendant's motion for summary judgment was appropriate because the court found there was nothing in the record to suggest that Dr. Brock saw, was engaged as a consultant, undertook to consult or received any remuneration for same in the treatment of the patient. *Id.* at 4.

135. *Id.* at 5 (Beatty, J., concurring) (stating generally that public policy concerns favor professionals who compare problem-solving approaches with other members of their profession, so they may learn from one another and benefit their clients).

the court in *Rainer v. Grossman*,[136] held that a lecturing medical school professor, who presented a discussion on gastroenterology at a continuing education conference and who opined that surgery was necessary for an ulcerative colitis patient based on a presentation of medical history, facts, and x-rays of the patient by the treating physician, had established no physician-patient relationship with the patient and had incurred no liability for malpractice.[137] The court in *Rainer* focused on the policy argument that it would be counterproductive to discourage professional discussion by extending malpractice liability to those with whom a treating physician merely confers.[138] In addition, *Rainer* focused on the fact that the consulting doctor was neither under the practitioner's control nor direction, nor had he personally examined the patient.[139] Thus, the philosophy of some courts has been to limit any extension of the duty of care and freely encourage professional consultation to benefit both the patients and the medical profession generally.[140]

In *Lopez v. Aziz*,[141] the Texas Court of Appeals focused on the degree of consent between patient and practitioner in forming a contract, either express or implied, and found no liability for simply conferring with a colleague.[142] The court's rationale relied on the fact that the treating physician who controlled the patient care was free to accept or reject the opinion of the consultant.[143]

Most states have a "consultation exemption" which allows out-of-state physicians who enter a state merely to consult with a local physician an exemption to the state's licensing requirements.[144] Other states are restricting the

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136. 107 Cal. Rptr. 469 (Cal. Ct. App. 1973).

137. *Id.* at 471-72; *see also* De Ville, *supra* note 116, at 3. This is the classic case of presenting information at an academic conference. The patient had the surgery suggested for ulcerative colitis, had complications and sued both his attending physician and the speaker. The trial court judge dismissed the claims against the speaker on summary judgment. The trial court decision was affirmed on appeal. *Id.*; *see also* Roberts v. Hunter, 426 S.E.2d 797 (S.C. 1993) (holding that a neurologist who was called to consult in an emergency room was not liable when the patient left before an examination could take place).

138. *Rainer*, 107 Cal. Rptr. at 472.

139. *Id.* (suggesting liability should rest with the treating physicians who can rely on their own judgment after following proper medical procedures).

140. *See* Hill v. Kokosky, 463 N.W.2d 265, 268 (Mich. Ct. App. 1990) (holding summary judgment was proper for the defendants in a case in which several doctors gave informal opinion to a treating obstetrician via telephone regarding the treatment alternatives of a twenty-two week pregnant woman who subsequently bore a child with cerebral palsy, mental retardation, and respiratory problems).

141. 852 S.W.2d 303, 306-07 (Tex. Ct. App. 1993).

142. *Id.* at 307.

143. *Id.*

144. *See* Granade & Sanders, *supra* note 26, at 69 n.9 (citing Phyllis F. Granade, *Implementing Telemedicine on a National Basis: A Legal Analysis of the Licensure Issues* (Draft for the Medical College of Georgia, April 1995); *see also* Jay H. Sanders, *Telemedicine: Capabilities, Growth Projections and Attending Issues Surrounding its Use*, 6 J. PHARMACY & L.

exemption to those physicians licensed within that state.[145] However, another line of cases clearly allows liability for malpractice when the consultant has never met the patient.[146] A telephone call made by a patient to a physician's office for the purposes of initiating treatment was held sufficient to create a physician-patient relationship and possible liability.[147] In *Bienz v. Central Suffolk Hospital*, the plaintiffs[148] survived a motion for summary judgment filed by the defendant physician when the only allegation against the physician was that plaintiffs had telephoned the office and received advice. The court would not speculate on the advice that may have been given over the phone by the physician but opined that the giving of medical advice, even over the phone, can serve to create an implied physician-patient relationship and is a question of fact for the jury to decide.[149]

Likewise, in *Davis v. Weiskopf*,[150] a physician—who had reviewed an emergency room patient's x-rays and knew the radiologist suggested that the patient had a bone cancer but never saw the patient in the office—was held to have a duty to warn the patient of the need for seeking medical treatment before summarily dismissing the patient.[151] Both *Bienz* and *Davis* can be reconciled with the other consulting cases based on the question of control. In neither case

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3 (1996). Dr. Sanders designed the telemedical system at the Medical College of Georgia that interacts with rural hospitals allowing for "electronic house calls" so patients can be cared for in their homes. He points out that a majority of states provide some form of consultation exemption. *Id.* at 7 (citing Phyllis Granade, *Telemedicine Licensing Issues* (1994) (unpublished manuscript, on file with the Medical College of Georgia)).

New York provides that any physician licensed by another state or country may provide in-state consultations only. *Id.* at 8. The following states permit out-of-state physicians to consult with a local physician: Alabama, California, Georgia, Oregon, South Carolina, South Dakota and Texas. *Id.*

145. Four states—Kansas, Oklahoma, South Dakota and Texas—seem to prohibit physicians unlicensed within the state from practicing telemedicine within the state, and twenty states are considering similar restrictions. *See Under Examination*, 13 NO. 4 MED. MALPRACTICE L. & STRATEGY 12 (1996). The article also presents a concern that malpractice insurance written for a doctor in one state may not cover him or her for alleged negligence or malpractice in telemedicine practiced in another state. *Id.*

146. *See, e.g.*, Davis v. Weiskopf, 439 N.E.2d 60, 65 (Ill. App. Ct. 1982) (physician refused to meet with and treat patient referred to him by another physician; physician had undertaken a duty of care and was required to perform to the required level of care) (citations omitted).

147. *See* Bienz v. Central Suffolk Hosp., 557 N.Y.S.2d 139 (N.Y. App. Div. 1990).

148. *Id.*

149. *Id.* at 139-40.

150. *Davis*, 439 N.E.2d at 60.

151. *Id.* at 61. The patient had made an appointment after the physician accepted the referral from an emergency room doctor. The first appointment was canceled and rescheduled without the physician seeing the patient. Before his second appointment, the patient called to state that he would be late and was informed that Dr. Hagman would not treat him. Neither Dr. Hagman nor anyone on the staff informed the patient of the severity of his illness. *Id.*

was there a primary care physician or other doctor who could ultimately be responsible for the care of the patient. Thus, courts are reluctant to find consultants liable for any opinions they render as long as another physician has ultimate responsibility for decision-making in the patient's case.

While Internet discussions are more analogous to the academic conference scenario than to formal consultancy relationships, there is a risk of liability to a practitioner using telemedicine.[152] Medical commentators framing responses to a discussion on the Internet can insulate themselves from liability in two ways: (1) by framing their responses in general terms to make it clear to any reader that there is no consultancy relationship; or (2) by issuing a disclaimer in writing with the original subscription and with each message written.[153]

As telemedicine expands exponentially, there are legal risks to the practitioner. The quality of the resolution of the information transmitted is of utmost concern as well, since it must be compacted and is ordinarily sent over telephone lines.[154] Distortion or artifacts present on a test or x-ray which resulted from the transmission or other sources can obscure or affect the practitioner's diagnosis and ultimately the opinion rendered, thereby increasing the practitioner's potential liability.[155] Since communication is the cornerstone of a good physician-patient relationship, will the impersonal and distant consultation of telemedicine result in increased litigation?[156]

One thing is certain. While "curbside consultations"[157] ordinarily have no liability attached to them, Internet discussions and telemedical conferencing will provide a record that saves the information which can be printed in hard copy form at a later time.[158] A hard copy print-out is discoverable before trial and could be uncovered in the defendant physician's computer files by a plaintiff's attorney.[159]

Despite the fact that at the state level, most states have at least one telemedicine system in operation or one in the planning stage, the risks of

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152. *See* De Ville, *supra* note 116 (discussing the minimal amount of liability to listserver discussions and those done on-line).

153. *Id.*

154. *See* Sanders, *supra* note 144, at 11-12. Sanders raises questions regarding the lack of scientific study in the area as well as lack of information regarding whether the telemedicine practitioner errs in the clinical observation and reporting of signs and symptoms. Thus he states that there are two levels of questions yet to be answered: (1) the safety and effectiveness of telemedicine, and (2) the exposure of practitioners to increased liability because of the impersonal nature of the service.

155. *Id.*

156. *Id.* at 12.

157. *See* De Ville, *supra* note 116 (explaining that "curbside consultations" are those discussions between professionals that are largely informal and which rarely generate liability).

158. *Id.*

159. *Id. See generally* Steven E. North, *Fundamentals of the Management of the Plaintiff's Malpractice Case*, 421 PLI/LIT 7 (1991).

liability from telemedicine are purely theoretical.[160] The benefits of expanding health care delivery are inestimable. In today's societal marketplace of crumbling health care structure and mandated managed care, telemedicine offers a consumer access, quality and economy. State licensing restrictions on the consulting relationship must be relaxed to accommodate the best expert possible in any field, regardless of the location or economic status of the health care consumer.

Current trends in case law suggest that a physician-patient relationship will be found between telemedicine practitioners and the patients they see.[161] Most cases demonstrate that consultants are rarely held liable for medical malpractice or negligence.[162] Careful risk management should include planning by the consultant, who should never feel obligated to offer advice if the quality of the telemedical transmission is inadequate.[163]

Telemedicine could result in revolutionary changes in our health care delivery system. The technology and availability of accessible, low-cost consulting could result, not only in meeting the prevailing health care needs but also in lowering malpractice liability for internists or general practitioners who could comfortably and economically seek expert advice for the benefit of their patients.

IV. HIGH LEGAL LIABILITY: CYBERMEDICINE

Imagine the peace of mind of having access to the American medical monolith from anywhere in the world. Doctors now practice medicine on the Internet. Those beepers physicians carry can now signal, not just physicians on-call for their office patients, but physicians on-call for any potential Internet patient who signs on to their web site worldwide. However, the electronic practice of remote doctoring makes both the American Medical Association and regulators on state medical boards wary and tense of the possible resulting malpractice liability.[164] Physicians who practice on the Internet so far have had impunity from any resulting suits, but that situation will soon change. The questions raised regarding such long distance practice range from how can one practice good medicine without percussion, auscultation and inspection of the patient to identification of the actual patient who is signing on for the medical

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160. *See* Sanders, *supra* note 144, at 5. The author points out the efficacy of using such systems for use in state correctional facilities to serve the prison population, increase security and lower costs. He also notes that the impetus for such development has been from university medical centers attempting to extend the levels of care to those in remote areas. The Defense Department anticipates cost reductions to serve military personnel, as well as their dependents in all locations throughout the world. *Id.*

161. *See* Granade & Sanders, *supra* note 26, at 73.

162. *Id.* (text, comments and cases included in the article suggest very low legal liability for consultants).

163. *Id.*

164. *See* Greene, *supra* note 90, at 46.

service provided.[165]

A. Cyberdocs: How It Works

On Friday, October 4, 1996, the wire services announced the first virtual real live doctors office on the World-Wide Web.[166] Other sites offered users nurses who could "triage" complaints, email consultation, self-diagnosis, health screening and medical devices that can be utilized at home and monitored in the cyberoffice.[167] Today, the user need not spend a great amount of time searching the Internet for specific information on a particular disease.[168] A group of board-certified Emergency Medicine specialists provide around-the-clock live medical care for patients on-line in the comfort of their own homes, as long as they have Internet access through a home computer.[169] The medical services provided vary depending on the need.[170] The web site can provide an acute medical consultation, a second opinion, care for minor medical illnesses, medical referrals, or simply write an excuse from work for a patient.[171] One innovative service is that of world-wide prescription refills.[172] The two physicians who started the service know that they are "venturing into uncharted waters," but are convinced that Internet medicine is "going to be big, and they want in on the ground floor."[173]

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165. *Id.*

166. *See Cyberdocs Today Announced the First Virtual Doctors[sic] Office on the World Wide Web!*, M2 PRESSWIRE, Oct. 4, 1996, *available in* 1996 WL 11276562; *see also Cyberdocs* (visited first July 7, 1997 and lastly on March 27, 1998) <http://www.cyberdocs.com> (devoting much attention to the qualifications of the physicians on the site and offering various medical services). *Id.* (asserting that all medical information is encrypted with RSA encryption technology and cannot be "hacked.").

167. *See Quacks, Bogus Treatments*, *supra* note 108 (noting that Dr. Foster Carr had created a cyberspace doctor's office in about 1995, wherein he intended to provide users with a total full-service medical practice on the Internet but not mentioning either prescription availability or disease diagnosis).

168. *See Cyberdocs Today*, *supra* note 166.

169. *Id.*

170. *See* Electronic mail (Email) sent by Steven A. Kohler, M.D. (July 4, 1997) (on file with author). Dr. Kohler founded *Cyberdocs*, which opened in September 1996, but had no patients until January 1997. As of July 1997, Kohler stated: "Presently we are averaging more than one patient per day, and it seems to be rapidly increasing." *Id.* Dr. Kohler further indicated that in June 1997, the web site generated approximately 40,000 "hits." *Id.* This indicates visits to the site, whether or not they actually sign up for services.

171. *Id.*

172. *Id.*

173. *See* Greene, *supra* note 90 (interviewing the founding physicians of *Cyberdocs*, Steven Kohler and Kerry Archer in April 1997; *see also Cyberdocs Today*, *supra* note 166. *Cyberdocs'* mission is to provide "initial consultative medical care, on a provisional basis only, for simple medical problems, pending further doctor-patient interaction in an office or hospital-based setting."

A patient taking advantage of *Cyberdocs* might be traveling abroad and need a refill of medication.[174] The physicians will not prescribe drugs which are subject to abuse or which are controlled.[175] One other very large benefit from the anonymity of the contact is that people who feel uncomfortable asking questions of their own doctor in person may use such a service and get treatment for an embarrassing ailment sooner.[176] Additionally, the web site provides direction to other helpful specific informational web sites on the Internet, as well as interpretation of health information which the patient does not understand.[177] A disclaimer informs those with serious symptoms to seek immediate medical care from a practitioner and further states that no person should consider the Internet as a substitute for a family doctor.[178]

Signing on to this web site is easy to do.[179] However, the doctors only accept patients who are either physically in Massachusetts or outside of the United States entirely, thus circumventing problems with state licensing laws.[180] When using the site, patients are asked to enter a credit card number and advised that all transactions are confidential and safe from detection, after which they are typically charged a fifty dollar fee for a chat with the physician on-call.[181] Prior to the electronic appointment or consultation, first time users are asked to record

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Id. Dr. Kohler describes people who are away from home on business, on vacation, at school, or living in a remote area or having no primary care doctor as prime users. *Id.*

174. *See* Greene, *supra* note 90. Dr. Kohler has stated as follows:

> Certainly, we have seen patients who clearly should be physically examined by a doctor, and then we tell the patients so, after discussing the possibilities of their illness with them. . . . In the virtual housecall portion of the site, we try to screen out patients who are not appropriate for the service by stating that if they have certain chief complaints (chest pain, abdominal pain, flank pain, headache, neck stiffness, shortness of breath), that they should not use the site and see a doctor immediately; also we make it clear that certain medications we will not prescribe, i.e., drugs of potential abuse and drugs that require close monitoring, and do provide at least a partial list of these medications. Any patient that requests a particular medication and that is the only thing they really want, and then we do not prescribe that medication, then we go ahead and refund the patient.

Email, *supra* note 170.

175. *See* Greene, *supra* note 90.

176. *Id.*; *see also Cyberdocs Today*, *supra* note 166 (providing the example that a patient may have the beginnings of bronchitis and because of receiving early antibiotic treatment, such early treatment may prevent the patient from a serious pneumonia that may have developed without prompt treatment).

177. *See Cyberdocs Today*, *supra* note 166.

178. *See* Greene, *supra* note 90.

179. Email, *supra* note 170. ("Once the patients have paid, they must first sign off to the affect [sic] that they are either physically in Massachusetts or outside of the US; then prior to seeing the doctor there is a disclaimor [sic] that they must sign to again; at any point they may back out without being charge. Finally, the discharge instructions also help out as a disclaimer [sic].") *Id.*

180. *Id.*

181. *See* Greene, *supra note* 90, at 45.

their medical history in their personal chart.[182] Then patients are asked to provide a brief description of their current illness or their medical concern.[183] Patients are then brought to the "examining room," and they are joined by the particular physician on call.[184] At the conclusion of the live portion of the consultation, discharge instructions can be saved or immediately printed out through the web site.[185] All physician-patient interaction becomes part of the patient's confidential medical record.[186] In addition, the electronic practice of medicine may be covered by the doctors' malpractice insurance policy if the insurance contains a telemedicine clause covering such a practice, as long as the physicians offer advice that is only in their field.[187]

B. Risk Factors of Internet Practitioners

Physicians who staff Virtual Housecalls and prescribe medication and treatment over the Internet could be prime candidates for lawsuits. Two things must exist in order for a malpractice claim to proceed: (1) a contractual physician-patient relationship must exist, and (2) the physician must breach a duty of care owed to the patient.[188] Unlike the consultant or specialist who may not exert any control over the patient, the practitioner on the Internet establishes

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182. *See Cyberdocs Today*, *supra* note 166.

183. *Id.*

184. *Id.*

185. *Id.*; *see also* Email, *supra* note 170. Dr. Kohler's Email stated the following:

> We have standardized discharge instructions on different illnesses and for different medications. They are very medicolegally oriented; the patient must sign off to the affect [sic] of a 'yes' or 'no' to them. It is clearly stated that if the patient wants a copy of them, that he or she can copy and paste, or press the browser print button when the discharge instructions are on the screen. We did it this way because we can keep things secure and encrypted for the patient. If we emailed the discharge instructions to the patient, we would have to have the patient set up for encryption, which we think would just open up a can of worms-it would make things too technically difficult for the patient. Finally, the entire doctor-patient interaction is electronically recorded, including the discharge instructions.

Id.

186. *See Cyberdocs Today*, *supra* note 166.

187. *See* Greene, *supra* note 90, at 45.

188. *See* Pendrak & Ericson, *supra* note 122; *see also* James L. Rigelhaupt, Jr., Annotation, *What Constitutes Physician-Patient Relationship for Malpractice Purposes*, 17 A.L.R.4TH 132 (1981 & Supp. 1997). The annotation states the following in its introduction:

> Ordinarily, recovery for malpractice against a physician is allowed only where there is a relationship of doctor and patient as the result of a contract, express or implied, that the doctor will treat the patient with proper professional skill and the patient will pay for such treatment, and there has been a breach of professional duty to the patient.

Id. (citing 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 201 (no date offered in original)).

a physician-patient relationship because the patient must first enter a credit card number in order to gain access to a physician.[189] Since the physicians' offer of services on the Internet is accepted by the patient with Internet access and a written credit card number forming the consideration for the promise, a contractual relationship is formed.[190] Thereafter, if the practitioner on the Internet accepts the patient, he undertakes a duty to that patient to treat them with reasonable skill and care.[191]

Concerns of documentation, communication and written follow-up are crucial to the management of all patients, especially those attended to on the Internet.[192] Legal liability, coupled with defensive medicine, are the prime factors in driving up the costs and decreasing the quality of medical care.[193] Risk management is therefore, of great concern to professionals who treat patients.[194]

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189. *See* Greene, *supra* note 90.

190. *See generally* JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS-BLACK LETTER SERIES (1983) (stating that a valid contract must have the elements of an offer, acceptance and consideration in order to be enforceable).

191. *See* Email, *supra* note 170. Dr. Steven Kohler states:

> We have frequent discussions regarding what illnesses are appropriate for us to treat, and what medications are appropriate to prescribe, and for how long. We do come across certain medical conditions that we have to "wing it" at the time, and then afterwards discuss the medical condition and a practical guideline for it.

Id. The problems created by this approach, such as which standards of care should prevail, forum shopping and licensing concerns, have been dealt with in articles by other authors. *See* Kathleen M. Vyborny, *Legal and Political Issues Facing Telemedicine*, 5 ANNALS HEALTH L. 61 & n.37 (1996) (citing R. James Brenner, *Teleradiology Poses Host of Thorny Legal Issues*, DIAGNOSTIC IMAGING, Apr. 1994, at 37). This article explores the myriad of legal problems with standards of care, Federalism, and licensing issues. The article further points out that over 60% of the journal articles listed in the Telemedicine Bibliography cited below were written since early 1993 (citing *Telemedicine: Past, Present, Future* (bibliography, 1634 citations) (Kristine Scannel et al. compilers, Bethesda Md., Nat'l Library of Medicine, Jan. 1966-Mar. 1995) (available from U.S. Gov't Printing Office, Washington D.C.)). Also, the author states that over 50% of the articles addressing legal and privacy issues were written from 1993-95. *Id.*

192. *See* Terese Hudson, *Documentation Crucial to E.D. Risk Management*, HOSP. & HEALTH NETWORKS, Mar. 20, 1992, at 6 (discussing issues in emergency department liability).

193. *See generally* David M. McIntosh & David C. Murray, *The High Cost of Medical Liability*, 1994 HUDSON INST., *available online* Hudson Briefing Paper (visited June 26, 1997) <http://www.wp.com/hcla/hudson1.htm>. The general focus of this paper is a study at a large Indiana hospital of the direct and indirect costs of medical liability involved in patient care. These direct costs included: insurance, self-insurance, awards and settlements, hospital legal fees and administrative costs. Indirect costs included the cost of all the treatment commonly referred to as "defensive medicine." *Id.* Defensive medicine is that medicine practiced in which a doctor orders unnecessary tests and procedures in order to avoid legal liability. *Id.* This single study indicated that $450 of each patient's total cost was due to legal liability. The authors support aggressive tort reform, with limits on attorney fees and revision of collateral source rules. *Id.*

194. *See* John C. West, *The Legal Implications of Medical Malpractice Guidelines*, 27 J.

Studies indicate that the "least-risky insurance risk class" is family practitioners and specialists who perform no surgery.[195] Also, there is typically more legal risk of liability when there is a lack of ongoing physician-patient relationship, and when the medical problem is complex and/or life-threatening.[196] This legal risk is greater in a setting in which the patient has had no prior relationship with the practitioner—for example the emergency room.[197] Further compounding the problem of liability in Internet practice, the physician cannot see, touch or listen to the patients before treating them.[198] Additionally, the physician cannot know whether the patient is a poor historian, a liar, a charlatan, or someone with Munchausen's syndrome.[199] It is much easier for patients, or their families, to become angry and sue a physician they just met fleetingly, than it is for them to sue their own family doctor with whom they have developed a trusting long-term relationship.[200] Thus, the physician who sees patients on the Internet, for the first time, will be in much the same situation as the emergency room physician and will be a prime candidate for legal liability.[201]

CONCLUSION

The future of medicine is here today. The Internet is unprecedented in the

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HEALTH & HOSP. L. 97 (1994) (estimating the cost of defensive medicine ranged from $3 to $6 billion in 1975, and from $15 to $40 billion in 1983). Therefore, using those estimates and extrapolating the author estimates that in 1993 the cost ranged from $13.6 to $81 billion. *Id.*

195. *See id.*

196. *See* Sally L. Reynolds et al., *Professional Liability in a Pediatric Emergency Department*, 87 PEDIATRICS 134-37 (1991). The article discusses risk in general of treating patients in an emergency room. The most high risk patients for lawsuit were found to be "appendicitis, wounds, fractures, meningitis, ectopic pregnancy, and myocardial infarction." *Id.* at 136. Frequently, higher risk is found in those patients who make multiple visits to the department for the same complaint. Failure to document the physical examinations performed was a major error. *Id.*

197. *See* Hudson, *supra* note 192.

198. Certainly, this inability to examine the patient will change with the addition of hardware and software programs, which are now available on phone lines, to do telemedicine consultation. Virtual stethoscope and other items will eventually make touch, hearing and feeling more accessible to the web sites.

199. *See* TABER'S, *supra* note 3, at 1158. Munchausen syndrome was named after the fictional 18th century baron created by Rudolph Raspe. This syndrome is characterized by malingering in which the patient may practice self-mutilation and deception to feign illness. Often the patients are knowledgeable about symptoms and diseases and are very convincing. These patients often travel from hospital to hospital never staying long enough to be given psychiatric treatment. *Id.*; *see also* Greene, *supra* note 90 (statement by Dr. Kohler that truthfulness in patients was a problem that he and his partner Archer faced every day at Salem (Mass.) hospital in the emergency room).

200. *See* Greene, *supra* note 90 (alluding to the fact that the anonymity of the physician may contribute to the litigiousness).

201. *See Quacks, Bogus Treatments*, *supra* note 108.

ease of transfer of information that it offers users of home computers; whether physicians, patients or others.[202] The utility and availability of the Internet combined with the ease of transfer of information presents a double-edged sword for patients and physicians. The benefits of on-line teleconferencing and consultations as well as the on-line practice of medicine in this era of limited health care dollars and managed care are inestimable. The legal quagmire of patient privacy issues, licensing laws, and unknown standards of care places a heavy burden on the health care professional or medical practitioner. The practice of telemedicine is here to stay, and virtually every state has made arrangements to allow its use, at least within its own borders, by increasing accessibility of its citizens to the best that can be provided in health care. Physicians' groups are joining the Internet and World-Wide Web with gusto and informing and educating their patients on-line. The freedom for physicians to practice medicine on a network without interference from health care providers is both attractive and alluring.

Today, the leading edge of medicine is represented by actual medical practice on the Internet. Many physicians' professional organizations have vigorously opposed Internet practice. These groups and individuals reason that liability from Internet practice could be extensive and they decry the impersonal and untouchable aspects of such practice. They intimate that such a development is ethically charged with lack of clinical responsibility. Like the critics of Galileo and Copernicus, the critics of Internet practice medical are wrong.

Common sense dictates that the Internet is a ubiquitous method of communication, access, and economy in the health care area. Physicians and other health care professionals should acquire the knowledge to use the Internet to help patients and their families. Physician pioneers in this area of Internet medical practice will one day be held out as innovative, conscientious leaders. While the courts have yet to test liability for medical malpractice in any case involving the practice of medicine on the Internet, such a case is bound to surface soon. Courts can proportion liability on a case-by-case basis. Courts can and will decide jurisdictional issues, standards of care, and the duty owed to the patient. Health professionals of all callings should be encouraged to utilize the Internet to educate and communicate with their patients. The risks of Internet practice can be easily managed and minimized through competent preparation by the intelligent practitioner. Federal licensing should be granted to all Board certified practitioners. The practitioners should be seen as being visited in their home state for liability purposes. Standards of care can be discerned through each board certified practice specialty.

Bad practitioners, quacks and charlatans should be punished, regardless of where they practice. The larger picture is that the dissemination of valid health information, as well as the practice of medicine by validly credentialed practitioners on-line performs a service for all of us. Thus, Internet practice should be protected by public policy concerns. Public health will benefit significantly. Furthermore, new frontiers in research will benefit us all as this

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202. *See* S. Andrew Spooner, *The Pediatric Internet*, 98 PEDIATRICS 1185 (1996).

information is disseminated more quickly. Not only will the consumer and the practitioner become better educated, but also practitioners will provide the patient with improved and more coordinated health care at a better price. With the coming millennium, your health insurer will cover calls made to an on-line practitioner, much the same as Medicare now pays for teleconferencing. The Internet is at the forefront of your healthcare future.

THE CRISIS IN THE IDEOLOGY OF CRIME

JOHN L. DIAMOND*

INTRODUCTION

In a previous article,[1] I argue that contemporary criminal law can not be fairly characterized as a moral system which condemns blameworthy choices. Instead, to a substantial degree, criminal law punishes transgressions without reference to personal culpability.[2] While traditional strict liability crimes are obvious examples,[3] they are not, as is sometimes argued, merely isolated exceptions to a regime which otherwise requires a culpable mens rea.[4] More generally, the well-accepted principle that ignorance of the law is ordinarily not an excuse, no matter how reasonable, illustrates this proposition.[5] In addition, the prevalence of negligence incorporates references to what a reasonable person should perceive and do without any inquiry into the specific mens rea of the defendant.[6]

What then explains society's decision to condemn some wrongs criminally, while allowing only civil or private institutional sanctions for other wrongs? It is the contention of this article that criminal law is the primary institution for transmitting social ideology.[7] The procedures of criminal law, unlike civil litigation, provide rituals by which the values and boundaries of society are sanctioned.[8] The difference between civil wrongs, such as torts, and crimes is *not*, as has been argued, inadvertent versus intentional culpability; nor is it a system based on deterrence,[9] since the wrongdoer may not have knowingly

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1. John L. Diamond, *The Myth of Morality and Fault in Criminal Law*, 34 AM. CRIM. L. REV. 111 (1996).

2. *See infra* Parts I, II.

3. *See, e.g.*, Commonwealth v. Koczwara, 155 A.2d 825 (Pa. 1959) (legislature intended to eliminate mens rea requirement and apply strict liability to tavern owner in sale of alcohol to minors). *See* STEPHEN A. SALTZBURG, JOHN L. DIAMOND, KIT KINSPORTS & THOMAS H. MORANETZ, CRIMINAL LAW 249-52 (1994).

4. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 242-49 (2d. ed. 1986).

5. *See infra* Part IV.

6. *See infra* Parts I.B, C. Negligence is an objective inquiry into what a reasonable person under the circumstances would have done. Criminal negligence differs from civil (tort) negligence only by degree, and criminal negligence requires a gross negligence or more significant unreasonable risk than required for civil negligence. *See* MODEL PENAL CODE § (1985); *see also* LAFAVE & SCOTT, *supra* note 4, at 211-13.

7. *See* Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 70-71, 93-95, 96 (1984) (discussing different theories adopted by critical legal historians to explore the use of the law in society).

8. *See id.*

9. *See, e.g.*, RICHARD A. EPSTEIN, CRIME AND TORT: OLD WIRE IN OLD BOTTLES IN

chosen to do wrong.[10] Criminal law is society's synthesis of what is evil and taboo as opposed to respectable transgressions.[11] Ultimately criminal law is the instrument by which the definitions of social morality are woven.[12]

Any complex society presents a multitude of wrongs which could be criminally condemned. Indeed, by looking at the wrongs which we defined as criminal, one can attempt to delineate principles which both do and should govern the decision to criminalize.

I. HISTORIC TABOOS

A. Bigamy and Statutory Rape

Bigamy[13] and statutory rape[14] are problematic crimes. Both impose potentially severe prison punishments,[15] yet neither traditionally has required a culpable state of mind.[16] Bigamy has traditionally punished simultaneous marriages even if the transgressor reasonably believed he or she was not simultaneously married.[17] Statutory rape historically has punished sexual intercourse between an adult male with an underage female even when the male

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ASSESSING THE CRIMINAL (1977); Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

10. *See infra* Parts I, II.

11. *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958). In the article, Mr. Hart stated:

> [W]e can say readily enough what a "crime" is. It is not simply anything which a legislature chooses to call a "crime." It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if duly shown to have taken place, will incur a *formal and solemn pronouncement of the moral condemnation of the community.*

Id. at 404-05 (emphasis added).

12. *See infra* Parts V, VI.

13. *See* SALTZBURG ET AL., *supra* note 3, at 250-51 (discussing bigamy).

14. *See id.* at 381-91 (discussing statutory rape).

15. *See, e.g.*, CAL. PENAL CODE § 261.5 (West 1995 & Supp. 1996) (punishing sexual intercourse by an individual 21 years or older with a minor who is under the age of 16 with one year in county jail or up to four years in state prison).

16. *See* W.E. Shipley, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 8 A.L.R.3D 1100 (1966) (noting that a majority of states still do not provide a mistake of age defense, thus resulting in prosecution of perpetrators without regards to their state of mind).

17. *See* Staley v. State, 131 N.W. 1028 (Neb. 1911) (defendant convicted of bigamy even though he was informed by three lawyers that his first marriage was void); *see also* People v. Vogel, 299 P.2d 850, 852-53 (Cal. 1956) (unlike statutory rape, courts have eliminated strict liability bigamy, perhaps reflecting contemporary flexibility over marriage structure).

reasonably believed the female was old enough to consent.[18] Punishment may be imposed, even though the defendant may not have acted in a subjective blameworthy manner because of a non-culpable factual mistake.[19] This is in contrast to most crimes, which would excuse a reasonable mistake of fact.[20] Bigamy and statutory rape address fundamental structural conceptions of how American and English society is organized.[21] Any transgression is condemnable without personal fault.[22]

B. Homicide

If the criminal law is unforgiving about bigamy and statutory rape, why is the criminal law more forgiving about murder and non-statutory rape? Like most crimes, murder excuses reasonable mistakes of fact.[23] If A believes B is an assailant, A's shooting of B is non-criminal, provided A's mistake is reasonable.[24] The privilege of self-defense excuses a reasonable error even when

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18. *See supra* note 16; *see also* State v. Stifler, 763 P.2d 308, 309-10 (Idaho Ct. App. 1988), *aff'd*, 788 P.2d 220 (Idaho 1990) (finding that an honest and reasonable mistake as to the victim's age was not a defense to the charge of statutory rape).

19. *See id.*; *see also* Shipley, *supra* note 16 (detailing that a mistake as to the victim's age is no excuse to liability for statutory rape). *But see* California v. Hernandez, 393 P.2d 673, 678 (Cal. 1964) (holding that a statutory rape defendant was entitled to present evidence of his reasonable belief that the woman was over the age of consent; if proved, the defendant would not be liable).

20. *See infra* Part IV.

21. *See* Diamond, *supra* note 1 (discussing the use of law in outlining "directional boundaries" for behavior in society).

For a discussion of the reasoning behind the original formulation and functional significance of statutory rape laws, see *Regina v. Prince*, All E.R. 881, 886, 887-88 (Cr. Cas. Res. 1875) (acknowledging that the purpose of such a statute was to recognize the father's "legal right" to the possession of his daughter). *See also* State v. Vicars, 183 N.W.2d 241, 243 (Neb. 1971) (illustrating the societal organizations' aspects of statutory rape through the recognition of the gravamen of the crime as the deprivation of an underage woman of her virginal chastity).

22. Even the Model Penal Code lacks a requirement of personal fault and refuses to acknowledge a mistake of age defense for statutory rape, yet it provides increased flexibility with regards to minors between the ages of ten and sixteen. *See* MODEL PENAL CODE §§ 213.1(1)(d), 213.1(1)(a), 213.4(4), 213.4(6) (1985).

23. *See* Gordon v. State, 52 Ala. 308 (1875) (stating that "[t]he criminal intention being of the essence of crime, if the intent is dependent on a knowledge of particular facts, a want of such knowledge, not the result of carelessness or negligence, relieves the act of criminality"); *see also* MODEL PENAL CODE § 2.04(1)(a) (1985); LAFAVE & SCOTT, *supra* note 4, at 405; SALTZBURG ET AL., *supra* note 3, at 216-17.

24. *See* People v. Goetz, 497 N.E.2d 41, 47 (N.Y. 1986) (interpreting the New York penal code self defense provision as requiring an objective reasonable belief that the use of force was necessary for protection against serious bodily injury, death, etc); *see also* Massachusetts v. Pierce, 138 Mass 165, 176 (1884) (stating that negligence should be measured by an objective standard,

an innocent victim is killed.[25] The explanation may be that the social order excuses and in many instances justifies and extols homicide.[26] What is critical to the ideological order is not the absence of homicide, but the absence of unexcused "malice aforethought." The ideological boundaries being advanced do not prohibit homicide but prohibit homicide with "malice aforethought," a specific mens rea.[27] The mens rea in most crimes is not necessarily present to provide an element of subjective culpability to criminal penalties, but to define objective boundaries that in this instance requires not merely acts and results but a specific state of mind.[28]

The lack of interest in the personal fault of the actor is underscored by homicide crimes, such as involuntary manslaughter, which require only the objective mens rea of negligence.[29] Negligence does not depend on the defendant's state of mind or his capacity.[30] Instead, it provides an objective standard of thought; what the reasonable person should think.[31] Some scholars have condemned negligence-based crimes because they do not necessarily require personal fault.[32] Consequently, negligence may appear along with strict liability crimes inconsistent with the subjective mens rea most crimes appear to embrace.[33]

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noting that the goal of the criminal law is to establish a "general standard" or at least general negative limits of conduct for the community, in the interest of the safety of all"). *Compare* MODEL PENAL CODE § 3.04(2)(b) (1985) and minority view which require a subjective belief that the use of force was necessary. *See also* John F. Wagner, Jr., Annotation, *Standard for Determination of Reasonableness of Criminal Defendant's Belief, for Purposes of Self-Defense Claim, That Physical Force is Necessary - Modern Cases*, 73 A.L.R.4TH 993 (1989).

25. *See id.*

26. For a discussion of justification defenses, see SALTZBURG ET AL., *supra* note 3, at 739-805. For a discussion of excuse defenses, see *id.* at 807-83.

27. *See, e.g.*, *Goetz*, 497 N.E.2d at 50 (N.Y. 1986) (noting that "[t]o completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force").

28. *See* Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 576-77 (1988) (providing a history of the role of mens rea in Anglo-Saxon law).

29. *See* Commonwealth v. Welansky, 55 N.E.2d 902 (Mass. 1944); Commonwealth v. Feinberg, 253 A.2d 636 (Pa. 1969); *see also* LAFAVE & SCOTT, *supra* note 4, at 669-774.

30. *See Welansky*, 55 N.E.2d at 910 (distinguishing negligence from recklessness and noting that, "[t]o constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm").

31. *See, e.g.*, Bussard v. State, 288 N.W. 187, 189 (Wis. 1939) (requiring awareness of risk in order to support an involuntary manslaughter conviction).

32. *See* JEROME HALL, LAW, SOCIAL SCIENCE AND CRIMINAL THEORY 244-65 (1982) (criticizing the Model Penal Code for advocating the inclusion of negligence within the criminal law).

33. *See generally* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635 (1993) (noting the elusive

Yet, there is consistency. Society is regulating the mind just as it regulates acts. Some acts like bigamy and statutory rape are per se physical transgressions,[34] while others like homicide require requisite states of mind to be transgressions. Killing the innocent is simply not a social taboo in many instances. There can, of course, be ideological transformations. Drunk driving and killing by drunk driving may be perceived differently in different eras.[35] The ideology to be imposed changes, but not concern for personal culpability per se.[36]

Homicide is often characterized as encompassing large variations in culpability.[37] Under a typical statutory scheme, first degree murder encompasses intent to kill with premeditation and deliberation.[38] Second degree murder includes the following: (1) intent to kill; (2) intent to commit serious bodily injury; and (3) extreme recklessness to human life.[39] In addition, under a typical felony murder scheme a death resulting from a felony can result in first degree murder if that felony is enumerated by the homicide statute and second degree murder if death occurs during other unlisted dangerous felonies.[40]

The lesser crime of voluntary manslaughter under the common law is applicable when one's intent to kill, intent to commit serious bodily injury or reckless conduct—although causing the victim's death was prompted by a provocation that would cause a reasonable person to lose his cool.[41] Historically, such provocations were statutorily enumerated and included, for example, encountering a spouse committing adultery.[42] Involuntary manslaughter

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and imprecise nature of mens rea). *See also* Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 357 (1989) (providing a detailed analysis of the historic use of strict liability in the United States).

34. *See supra* Part I.A.

35. Most states today address drunk driving offenses which result in the death of another specifically within their murder/homicide statutes. *See, e.g.*, CAL. PENAL CODE § 191.5 (1987); N.Y. PENAL LAW § 125.12 (1983).

36. Involuntary intoxication remains a defense as the defendant is not culpable due to unawareness of ingestion of a substance or forced involuntary ingestion. *See, e.g.*, People v. Scott, 194 Cal. Rptr. 633 (Cal. Ct. App. 1983) (defendant raised the successful defense of mistake of fact emanating from his involuntary intoxication by an unknowing ingestion of a hallucinogenic substance).

37. *See* Gardner, *supra* note 33.

38. *See, e.g.*, CAL. PENAL CODE § 187-189, 191.5, 192 (1987). *See also* People v. Anderson, 447 P.2d 942 (Cal. 1968); Commonwealth v. Carroll, 194 A.2d 911 (Pa. 1963).

39. *See* SALTZBURG ET AL., *supra* note 3, at 259-60; *see also* Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 994-98 (1932); MODEL PENAL CODE § 210.2.

40. *See, e.g.*, People v. Washington, 402 P.2d 130 (Cal. 1965). *See also* State v. Wesson, 802 P.2d 574 (Kan. 1990) (discussing the imposition of a first degree murder offense on all felony murders unlike the bifurcated approach utilized in most states).

41. *See, e.g.*, State v. Thornton, 730 S.W.2d 309 (Tenn. 1987); Maher v. People, 10 Mich. 212 (1862); State v. Ross, 501 P.2d 632 (Utah 1972).

42. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 477 (1987) (listing as traditional provocations under the common law: a serious assault or battery; witnessing adultery

criminalizes an accidental killing caused by gross or criminal negligence and, like voluntary manslaughter, is punished much less severely than murder.[43]

The variations in homicide based on an identical result—the victim's death—but involving a different mens rea, are often perceived as evidence of the role of culpability within the criminal law.[44] Yet, homicide is also quite substantial evidence that culpability is *not* the fundamental explanation for the homicide distinctions in punishment and condemnation.[45] The persistence in most jurisdictions of felony murder is blatantly inconsistent with a system punishing in proportion to personal fault.[46] An unforeseen, accidental death, if the death occurred during certain felonies such as robbery or burglary, can in many jurisdictions result in a first degree murder conviction.[47] Yet, it is very difficult to argue that an unanticipated heart attack stimulated by a burglary or robbery, where no deadly weapon or force is employed, constitutes the most culpable kind of homicide warranting a first degree conviction.[48] Involuntary manslaughter is also problematic from a personal culpability perspective, since criminal negligence—the relevant "mens rea"—does not inquire into the defendant's mind.[49] Instead, negligence simply inquires whether a reasonable person would have found the behavior to be a substantial, unjustified risk.[50] The

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by one's wife, mutual consent, an unlawful arrest; and a crime against a close relative).

43. *See, e.g.*, Commonwealth v. Pierce, 138 Mass. 165, 180 (1884); Walker v. Superior Court, 763 P.2d 852, 868 (Cal. 1988). *See* PA. CONS. STAT. ANN. § 2504 (West 1983 & Supp. 1997); CAL. PENAL CODE § 192 (1987); *see also* N.Y. PENAL LAW § 125.10 (utilizing criminally negligent homicide in lieu of the involuntary manslaughter title).

44. *See* Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701 (1937).

45. *See generally* Diamond, *supra* note 1.

46. *See id.*

47. *See* SALZBURG ET AL., *supra* note 3, at 325-40 (discussing the felony murder rule).

48. *See* People v. Stamp, 82 Cal. Rpt. 598 (Cal. Ct. App. 1969) (60-year-old obese man with heart problems dies of heart attack in armed robbery); *In re* Anthony M., 471 N.E.2d 447 (N.Y. 1984) (83-year-old woman dies from hip operation for injury caused by purse snatching amounting to robbery).

49. *But see* Wagner, *supra* note 24 (noting that not every court defines criminal negligence objectively). *See, e.g.*, Commonwealth v. Feinberg, 253 A.2d 636 (Pa. 1969). *Compare* Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L.J. 539 (1989). The author notes the following:

> At bottom, negligence involves a judgment that, based on what the actor knew, he or she should have known something else and should therefore have known enough to have understood the obligation to act more carefully. In spite of its concentration on objective components, the baseline for negligence is the context as the actor perceived it. Negligence, therefore, involves a subjective inquiry (what the actor actually knew about the context) and an objective inquiry (the inferences that should have been drawn from what the actor knew).

Id. at 549.

50. *See, e.g.*, Washington v. Williams, 484 P.2d 1167 (Wash Ct. App. 1971) (The court

intellectual ability of the defendant to have recognized the risk is simply not at issue.[51]

An ideological model of criminal law does explain these apparent anomalies in an analysis dependent on individual culpability. Unlike traditional strict liability crimes[52]—such as statutory rape, bigamy and public welfare crimes—society can not condemn all homicides because society does not view all killing as wrong or even undesirable.[53] It is heroic to kill in military contexts; it is heroic to kill on behalf of law enforcement. The police officer or private citizen who shoots the serial killer who is in the process of killing an innocent victim has not committed a social wrong. Indeed, the police officer who, without a less deadly alternative, declines to intervene on behalf of an innocent victim would instead be criticized if not condemned. It is, therefore, impossible to criminalize all homicides. On the other hand, society can and traditionally does condemn multiple marriage or sexual intercourse with a minor.[54] There is no "good" simultaneous marriage or "good" sexual intercourse with a child.[55]

Criminal homicide could be circumstantially criminalized without any reference to a mental state. For example, if A kills B as B is in the process of killing A or C, A's killing could be declared justified and non-criminal based on the objective actual necessity of A to defend himself or another.[56] Instead, the common law will justify the killing whenever A reasonably believes self-defense in response to imminent deadly force is necessary.[57] Yet, the standard still maintains an important objective component, namely the circumstances under which a reasonable person would perceive that he or she was in imminent danger from an attack.[58] The criminal law instead of condemning force alone is

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found defendant parents, who had sixth and eleventh grade educations, negligent under an objective standard for failing to present their child to a physician for treatment. The parents claimed that they believed the child had a toothache, but did not realize that the condition had worsened into gangrene.).

51. *See id.*; *see also* GLANVILLE LLEWELYN WILLIAMS, CRIMINAL LAW: THE GENERAL PART 99 (2d ed. 1961) ("With the best will in the world, we all of us at some time in our lives make negligent mistakes.").

52. *See supra* Part I.A.

53. For a discussion of defenses, see SALTZBURG ET AL., *supra* note 3, at 739-882.

54. *See supra* Part I.A.

55. *See, e.g.*, Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (discussing statutory rape as a protection of a girl or young woman against her own immaturity).

56. *See* Joshua Dressler, *New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinkers and Rethinking*, 32 UCLA L. REV. 61 (1984).

57. For a discussion of self-defense, see SALTZBURG ET AL., *supra* note 3, at 740-71.

58. *See* Wagner, *supra* note 24 (discussing objective versus subjective standards for establishment of the defense of self defense). *See, e.g.*, People v. Goetz, 497 N.E.2d 41, 41 (N.Y. 1986) (requiring an objectively reasonable belief and arguing that a subjectively reasonable belief would allow citizens to set their own standards). *Compare* MODEL PENAL CODE § 3.04(1) (1985) (adopting a subjective standard limited by the provisions of MODEL PENAL CODE § 3.09(2) (1985), providing, in turn, that recklessness or negligence in a belief or acquisition of information will

condemning force when the idealized reasonable person would not use force.[59] In short, society is proscribing conduct in the context of particular sensory perceptions. Society has chosen not to condemn killing in actual self-defense. Similarly, society has chosen not to condemn killing when the hypothetical reasonable person of ordinary intelligence and experience would "perceive" the circumstances as requiring self-defense.[60]

It is wrong, however, to equate the introduction of this "mens rea" as requiring personal culpability.[61] The "mens rea" is still objective. Indeed, while the defendant must subjectively possess the approved mens rea standard to be excused from murder, the standard itself is objective. The standard is not whether the defendant in good faith perceived self-defense necessary, but whether the defendant under the circumstances *should have* perceived circumstances that justified killing.[62] In most instances, the objective condition could preclude any justification without reference to the defendant's actual mental ability, perceptions or conclusions.[63] The ability of the defendant to perceive like a reasonable person is irrelevant, except where a physical sensory disability like blindness is present.[64]

Personal culpability, in the sense of choosing to do wrong, is simply not a basic component of mens rea. Instead, the criminal law imposes physical *and* mental standards to which one must subscribe. The traditional law authorizing defense of others illustrates this proposition well.[65] If A killed B to save an innocent C, A is not necessarily excused even if A reasonably believed B wrongfully attacked C with deadly force.[66] Traditionally, A is justified to use force only when the reasonable perception of the need for self-defense existed

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deprive the defendant of a self-defense claim).

See GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL 61 (1988) (criticizing the subjective approach to self-defense).

59. *See id.*

60. *See id.*

61. *See, e.g.*, MODEL PENAL CODE § 3.04(1) (1985). This section creates a subjective standard for self defense which, pursuant to MODEL PENAL CODE § 3.09(2) (1985), does not provide protection for a reckless or negligent misjudgment, thus effectively creating an objective standard. *Id.*

62. *See id. See, e.g., Goetz*, 497 N.E.2d at 51 (requiring an objectively reasonable belief).

63. Some states have adopted the concept of imperfect self defense wherein a subjectively honest fear, while not objectively reasonable, negates the malice required to attain a murder conviction. *See, e.g.*, State v. Faulkner, 483 A.2d 759, 768 (Md. 1984); Commonwealth v. Colandro, 80 A. 571, 573-75 (Pa. 1911). Note that in a jurisdiction not following this view, an honest but objectively unreasonable fear would result in a murder conviction against the defendant.

64. *See* Washington v. Williams, 484 P.2d 1167, 1171 (Wash. Ct. App. 1971).

65. *See* SALTZBURG ET AL., *supra* note 3, at 750 (discussing of the defense of others justification); *see also* Danny R. Veilleux, Annotation, *Construction and Application of Statutes Justifying the Use of Force to Prevent the Use of Force Against Another*, 71 A.L.R.4TH 940 (1989).

66. *See id.*

with C, the intended victim.[67] A good Samaritan who intervened improperly is not excused even if a reasonable person would have made the same mistake.[68] The circumstances, including the mental perceptions, had to be justified from the victim's perspective.[69] While mental perception is being utilized, it is not always the defendant's mental perception or culpability which is at issue.

I do not mean to suggest that personal culpability does not correlate in many instances to criminal boundaries. The unjustified intent to kill with premeditation and deliberation is more evil than an accidental killing covered by manslaughter. It is wrong, however, to view partial overlap as an overriding principle.[70] Since only some homicides are condemnable, as opposed to all statutory rapes[71] or adulterated food in commerce,[72] the mens rea accompanying the acts becomes critical so that desirable acts are not condemned. Society encourages acts of self-defense and is laudatory of such behavior even if the innocent are killed by a reasonable misperception of the circumstance. Yet, criminal homicide is not based on a "mens rea" of personal culpability, despite inevitable overlap. Involuntary manslaughter and self-defense are prescribed by objective negligence which condemns good faith conduct that fails to meet an objective standard of behavior.[73] Felony murder imposes strict liability once the defendant engages in the mens rea of other qualifying felonies such as burglary or robbery.[74]

The Model Penal Code recognized how traditional homicide deviated from a principled criminal law based on culpability and attempted to adjust it. The defenses under the Model Penal Code require only good faith and not reasonable

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67. *See* LAFAVE & SCOTT, *supra* note 4, at 663-67 (discussing the sometimes called "alter ego" rule, wherein the right to defend another coexists with the right of the other to defend himself). *See, e.g.*, People v. Young, 183 N.E.2d 319, 320 (N.Y. 1962) (holding that while the defendant may have reasonably believed the third party was being attacked when in fact he was being arrested by undercover officers, the right to defend a third party could not exceed the right to self defense. The third party had no right to defend himself against a lawful arrest; thus, the defense of others justification failed.).

68. *See id.* (observing that an alternate view finds that, so long as the defendant reasonably believed the other is being unlawfully attacked, a defense of others justification should be permitted). *See, e.g.*, Fersner v. United States, 482 A.2d 387 (D.C. 1984) (finding a trial judge error in instructing that a defendant's self-defense justification depended exclusively on the perceptions of the third party).

69. *See Young*, 183 N.E.2d at 319-20 (noting that "the right of a person to defend another ordinarily should not be greater than such persons right to defend himself"). *But see* N.Y. PENAL LAW § 35.15 (1983) (providing that the force a reasonable person believes necessary to defend himself would suffice to support the person's defense of a third party).

70. *See* Diamond, *supra* note 1.

71. *See supra* Part II.A.

72. *See infra* Part II.

73. *See supra* notes 24, 29 and accompanying text.

74. *See supra* note 46 and accompanying text.

belief in the necessity of force.[75] Nevertheless, most jurisdictions have not adopted the Model Penal Code position.[76] Furthermore, the Model Penal Code itself would still impose criminal liability in this context for negligent homicide,[77] a crime the Model Penal Code conceived to remove negligence from involuntary manslaughter. Yet, negligent homicide under the Model Penal Code scheme is still punishable by five years imprisonment.[78]

C. Rape

The contrast in treatment between forcible rape[79] and statutory rape[80] also illustrates that mens rea is better explained as an ideological boundary rather than a mechanism of defining personal culpability.[81] Statutory rape as noted above is generally a strict liability crime.[82] A reasonable mistake that the female is underage is not a defense.[83] Any physical intrusion into this social boundary, originally intended to protect the father's property interest, is criminal.[84] Forcible rape initially also had a very limited requisite mens rea.[85] Just as statutory rape, intent to have sexual intercourse was the only mens rea required.

In lieu of additional mens rea requirements, however, non-statutory rape traditionally required a variety of physical acts by the female victim, including

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75. *See* MODEL PENAL CODE § 3.04(1) (1985).

76. *See* Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 505-06 (1986) (observing that only two states, Delaware and Kentucky, have followed the Model Penal Code and eliminated defective defenses); *see also* SALTZBURG ET AL., *supra* note 3, at 748.

77. *See* MODEL PENAL CODE § 210.4 (1985).

78. *See* MODEL PENAL CODE §§ 3.09(2), 210.4, & 6.06(3) (1985) (imposing a maximum of five years imprisonment).

79. *See, e.g.*, People v. Barnes, 721 P.2d 110 (Cal. 1986); State v. Rusk, 424 A.2d 720 (Md. 1981) (providing statutory definitions for forcible rape or coerced sexual intercourse).

80. *See, e.g.*, State v. Stiffler, 763 P.2d 308 (Idaho App. 1988), *aff'd*, 788 P.2d 220 (Idaho 1990).

81. For a discussion of the evolution and changing nature of rape laws, see Patricia Searles & Ronald J. Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN'S RTS. L. REP. 25, 40 (1987).

82. *See* SALTZBURG ET AL., *supra* note 3, at 386-87; *see also* W.D. Shipley, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 8 A.L.R.3D 1100 (1966).

83. *See id.*; *see also supra* notes 15, 16.

84. *See* Karst, *supra* note 55, at 458 (Statutory rape "originated in thirteenth century England in order to conserve a girl's eligibility for marriage, and thus her value to her father as a means to enhance the family's wealth. What was being protected was not the girl's freedom, but precisely her status as an object.").

85. For a discussion of the history of mens rea in forcible rape cases, see *Reynolds v. State*, 664 P.2d 621 (Alaska App. 1983).

"utmost resistance" to the sexual assault.[86] Under traditional rape law, the husband is exempt from criminal liability for coerced sexual intercourse with his wife.[87] Traditional forcible rape for non-spouses, as noted above, did not condemn duressed sexual intercourse but only sex where the woman resisted violence to the utmost.[88] The evolution of rape law shows shifts in the amount of resistance the victim must display.[89] The rigorous physical requirements, which defined rape in a very limited number of instances, have been primarily replaced by mens rea requirements specifying that the actor's belief as to the victim's consent generally must be either negligent or reckless.[90]

Such boundaries of criminal behavior reflect dominant social ideology which is more tolerant toward compelled sexual intercourse of an adult woman than consensual sex with an underage girl.[91] The issue is not the defendant's personal culpability but the physical and mental conduct of the defendant. Indeed, the transition from less requisite physical acts to more required mens rea or mental behavior for adult rape, if anything, increases the vulnerability of an actor for inadvertent criminality.[92] The historic rape crime (excluding statutory rape) was so defendant oriented in its physical requirements that the removal of specific physical requirements, such as utmost resistance, more than compensate for an additional mental element.[93] Further, the mental element in jurisdictions adopting criminal liability for the actor's negligent perception of consent (the mens rea of negligence) still would make no inquiry into the actual capacity or subjective culpability of the defendant.[94]

The utilization of mens rea in imposing criminality on individuals can

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86. *See* People v. Barnes, 721 P.2d 110 (Cal. 1986); State v. Rusk, 424 A.2d 720 (Md. 1981).

87. *See, e.g.*, People v. Brown, 632 P.2d 1025 (Colo. 1981); MODEL PENAL CODE § 213.6(2) cmt. at 418 (1985) (preserving marital example for "persons living together as man and wife, regardless of the legal status of the relationship").

88. *See, e.g.*, People v. Dohring, 59 N.Y. 374, 384 (1874).

89. *See Reynolds*, 664 P.2d at 623 (noting that the common law mens rea requirement of intentional intercourse was mitigated by the requirement that the victim had expressed lack of consent through utmost resistance); *see also* People v. Mayberry, 542 P.2d 1337, 1345 (Cal. 1975) (requiring proof of at least negligence concerning victim's lack of consent in addition to proof of intentional intercourse in order to uphold a rape conviction).

90. *See Mayberry*, 542 P.2d at 1345.

91. *See* Karst, *supra* note 55, at 458 (discussing the changing nature of the justification for the imposition of strict liability in statutory rape cases). Traditional justification was based on the protection of a father's property interests. Modern justification is based upon protecting a young woman from her own immaturity. *Id.*

92. *See Mayberry*, 542 P.2d at 1344-45 (considering the imposition of liability for negligent rape); *see also* Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2704 (1991). *Consider* Lani A. Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1114 (1993).

93. *See Reynolds*, 664 P.2d at 625.

94. *See Mayberry*, 542 P.2d at 1346.

therefore be misleading. Mens rea is often simply another *objective* requirement of behavior, one involving mental or ideological compliance.

II. PUBLIC WELFARE CRIMES

Public welfare crimes,[95] those which impact generally on the public well-being, ordinarily subject violation to only minor monetary penalties. Examples of such crimes include the following: adulterated food;[96] serving alcohol to minors;[97] and mislabeling the weight of commodities for sale.[98] Public welfare crimes have traditionally dispensed with any mens rea.[99] Consequently, even a defendant's reasonable mistake which inadvertently violates conduct rules is criminalized.[100] In general, such crimes are theoretically dismissed by many contemporary criminal law theorists as minor aberrations from the contemporary approach of emphasizing the blameworthiness of criminal law violators.[101] Since penalties for these crimes are usually minor in nature and generally involve only slight monetary sanctions, such theorists tend to discount public welfare crimes as something less than real crimes.[102] Nevertheless, the persistence and

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95. For a discussion of the historical theory of public welfare offenses, see JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 327-37 (2d ed. 1960).

96. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975).

97. *See, e.g.*, Commonwealth v. Koczwara, 155 A.2d 825, 826-27 (Pa. 1959).

98. *See, e.g.*, *Ex parte* Marley, 175 P.2d 832, 833 (Cal. 1946).

99. *See* Commonwealth v. Farren, 91 Mass. 489, 490 (1864) (justifying the imposition of criminal strict liability for the selling of adulterated milk by emphasizing, the language of the statute; the fact the penalty was a fine; the impracticability of requiring proof of knowledge; the importance of protecting the community against the common adulteration of food; and the reasonableness of imposing the risk upon the dealer and thus holding him "absolutely liable").

100. *See supra* Part I.A for a comparison with bigamy and statutory rape. *See also* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 198-200 (1991) (discussing the danger of overcriminalization, whereby acts are labeled criminal even thought the actor lacked "blameworthiness"); Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895, 1897 (1992) (warning that white collar crime might over-generalize in some areas and stigmatize individuals who lack subjective culpability).

101. *See Koczwara*, 55 A.2d at 827. The court in *Koczwara* observed that

> [s]uch so-called statutory crimes are in reality an attempt to utilize the machinery of criminal administration as an enforcing arm for social regulations of a purely civil nature, with the punishment totally unrelated to questions of moral wrongdoing or guilt. It is here that the social interest in the general well-being and security of the populace has been held to outweigh the individual interest of the particular defendant. The penalty is imposed despite the defendant's lack of a criminal intent or mens rea.

Id.

102. See, for example, the Model Penal Code position, which

> makes a frontal attack on absolute or strict liability in the penal law, whenever the offense carries the possibility of criminal conviction, for which a sentence of probation

occasionally more severe penalties imposed suggest that such crimes resonate a true theme in understanding the nature of criminal law.[103]

Public welfare crimes, like statutory rape and bigamy, generally address social structural rules and provide boundaries which help to organize the transactional and ideological infrastructure of society.[104] The family structure, symbolized in this but not all other cultures, by monogamy, is perceived as fundamental to social organization.[105] Mitigation for non-culpable transgressions would confuse the ideological imperative. In a similar vein, statutory rape protects social infrastructure. Sexual autonomy of what society defines as a non-sexual child under the authority of the father under traditional rationale (and the parents under more modern parlance) would challenge the basic family structure as American and English society so defined it.[106]

Similarly, public welfare crimes address commercial and economic infrastructure.[107] Confidence in mass-produced foods, commercial commodities, and regulated distribution of controlled substances (including alcohol), require complete acknowledgment in the accepted social mores of conduct. However, such commercial rules are less-imbedded into the social organization and the penalties for transgression are clearly less.

This is not to suggest that rules against property crimes or crimes of violence are not essential to social order. The ideology that must be transmitted is, however, more obscure. Acquiring property from others or engaging in violence is often well accepted within societal norms. Consequently, only certain mindsets in the acquisition of property or imposition of violence are condemnable.

III. STRUCTURAL VERSUS TRANSACTIONAL CRIMES

Crimes of violence and crimes against property are directed toward individuals within society but do not generally challenge the structural

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or imprisonment may be imposed. The method used is not to abrogate strict liability completely, but to provide that when conviction rests upon that basis the grade of the offense is reduced to a violation, which is not a "crime" and under Sections 1.04(5) and 6.02(4) may result in no sentence other than a fine, or a fine and forfeiture or other authorized civil penalty.

MODEL PENAL CODE § 2.05 cmt. at 282-83 (1985).

103. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975). *See* Diamond, *supra* note 1, at 116-17 (noting that despite the Model Penal Code's rejection of strict liability as inconsistent with a moral fault system, most political jurisdictions still utilize strict liability punishments and crimes).

104. *See* Karst, *supra* note 55, at 473.

105. *See* Zablocki v. Redhall, 434 U.S. 374, 384 (1978). The Court characterized marriage as a "bilateral loyalty" and stating that it is "the foundation of family and society." *Id.*

106. *See* Karst, *supra* note 55, at 458 (discussing the traditional justification of transgressions against the traditional property rights of father in their daughters).

107. Commonwealth v. Farren, 91 Mass. 489 (1864).

organization of the culture.[108] Rather than being what can be characterized as *structural* crimes, crimes of violence and property acquisition are *transactional* crimes.[109] Structural crimes such as bigamy and statutory rape define taboo relationships in a manner that insures the basic family structure around which society builds.[110] In a much less intense way, the public welfare crimes enforce the general rules and organizational infrastructure of commerce.[111] There is theoretically a social structure within which individual behavior must interact.[112]

What I characterize as structural crimes do not require mens rea because the actions are defined as wrong and condemnable in virtually all circumstances. Historically, statutory rape and bigamy are constant "wrongs."[113] The mens rea is irrelevant to its desirability of punishing these crimes. Similarly, the sale of adulterated goods and the utilization of false weights in mass commerce are unjustified wrongs which, like statutory rape, traditionally define the social organization of society.[114] Transactional crimes are more complex than structural crimes and require the establishment of a culpable mens rea. Killing, the imposition of physical injury, and coerced sexual intercourse against adults (as opposed to statutory rape) are not prohibited but instead regulated.[115] Not all homicide is criminal homicide, just as not all coerced sexual intercourse is criminal.[116]

In a military or crime-prevention context, as discussed above, killing can be perceived as highly laudatory. Killing in self-defense is justified, within certain

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108. *See generally* Hart, *supra* note 11 (arguing that crime is conduct the community finds blameworthy).

109. A comparative distinction is often made between crimes which are *malum in se* versus *malum prohibitum*. An act which is *malum in se* is "inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state." BLACKS LAW DICTIONARY 959 (6th ed. 1990). An act which is *malum prohibitum* is "an act which is not inherently immoral but becomes so because its commission is expressly forbidden by positive law; an act involving illegality resulting from positive law." *Id.* at 960.

However, this distinction is different from the structural versus transactional crime distinction. Structural violations are culpable simply as transgressions against societal mores despite the absence of a specific mens rea. Both statutory rape and public welfare crimes are structural crimes, while only statutory rape is *malum in se*. Transactional crimes are those which require a specific mens rea in order to establish a breach of societal mores. The killing of another in self-defense is simply not a transgression against society if it is justifiable, despite that fact that the killing of another is *malum in se*.

110. *See supra* Part I.A.

111. *See supra* Part II.

112. *See generally* HALL, *supra* note 32. *See also* Commonwealth v. Farren, 91 Mass. 490 (1864) (justifying the imposition of criminal strict liability for the sale of adulterated milk).

113. *See supra* Part I.A.

114. *See supra* Part II, notes 103-05 and accompanying text.

115. *See supra* Parts I.B-C.

116. *Id.*

constraints.[117] Traditionally and still prevalently, a reasonable belief of imminent danger of death or serious bodily injury allows the actor the privilege to kill an apparent assailant.[118] The justification exists even if in reality the apparent assailant is innocent.[119] Furthermore, while there is some inquiry into the actor's mental state to determine whether he sincerely perceived the necessity to kill, the defense requires a reasonable belief as well.[120] Consequently, an unreasonable but sincere belief, while not subjectively culpable since the actor may not have the capacity to act reasonably, nevertheless imposes criminal condemnation.[121]

Coercive sexual intercourse is also allowed under certain circumstances. Most states give the husband immunity from coerced sexual intercourse.[122] Traditionally, criminal condemnation for a non-husband's coerced sexual intercourse required utmost resistance by the victim.[123] Certain forms of coercion remain outside the reach of most criminal rape statutes.

In property crimes[124] the criminal law must delineate between wrongful and praiseworthy property acquisition activities in a capitalistic society.[125] For example, in most states false promises inducing transfer of title is not a basis for criminal theft.[126] The use of false pretense in obtaining title to property was initially not criminal, and one who engaged in such misconduct was even perceived with some degree of admiration as a sharp, crafty business negotiator.[127] Similarly, embezzlement—the appropriation of property that had been entrusted to another—was not perceived as criminal but rather was viewed as a private, civil dispute between associates.[128] Even today, states restrict false pretenses to misrepresentations of past or present facts and most exclude misrepresentations of "present intent" as a qualifying present fact. Thus, fraudulent promises are not criminalized.[129] Similarly, wrongful borrowings are

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117. *See supra* notes 57, 58.

118. *See* Wagner, *supra* note 24, § 2.

119. *Id.*

120. *Id.*

121. *See supra* note 63.

122. *See* DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 6-7 (1985); DIANA E.H. RUSSEL, RAPE IN MARRIAGE 57-58 (1990).

123. *See supra* Part I.C.

124. *See supra* note 84, at 459-553 (discussing property crimes).

125. *See* LOUIS B. SCHWARTZ, THEFT, ENCYCLOPEDIA OF CRIME AND JUSTICE, THEFT 1537 (1983) (The author observes that, "One problem that dogs the law of theft . . . is that in a commercial society no clear line can be drawn between greedy antisocial acquisitive behavior on the one hand and, on the other hand, aggressive selling advertising, and other entrepreneurial activity that is highly regarded or at least commonly tolerated.").

126. *See, e.g.*, Chaplin v. United States, 157 F.2d 697, 698 (D.C. Cir. 1946).

127. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 289 (3d ed. 1982).

128. *See* JEROME HALL, THEFT, LAW AND SOCIETY 35-38 (2d ed. 1952).

129. *See, e.g.*, Commonwealth v. Bomersbach, 302 A.2d 472, 473 (Pa. Super. Ct. 1973) (holding that representations of actions to be taken in the future will not suffice for false pretenses). *See also* MODEL PENAL CODE § 223.2 (1985) (following a minority approach which criminalizes

not generally criminalized.[130]

The criminal regulation of intrasocial interaction is, at times, complex. Conduct alone is not being condemned, but particular states of mind accompanying conduct are jointly condemned.[131] Such states of mind do not necessarily relate to blameworthy conduct. Instead, the criminal law is proscribing mental conduct (often as in defenses in the context of what the hypothetical reasonable person would think) as an objective boundary along with acts. Ultimately, criminal law is enforcing an ideological mindset and punishing deviation whether voluntary or not.[132]

IV. IGNORANCE OF THE LAW

In general, criminal law does not forgive innocent ignorance of the criminal law.[133] With the exception of estoppel arguments where the state has mislead the individual, even reasonable ignorance is not excused.[134] This is in distinct contrast to mistakes of fact where most crimes excuse reasonable mistakes and some so-called specific intent crimes excuse sincere, even if unreasonable, mistakes as well.[135] While what I have categorized as structural crimes (bigamy, statutory rape and public welfare crimes) are exceptions and do not excuse

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false promises as a provable lie of present intentions).

130. *See, e.g.*, People v. Kunkin, 507 P.2d 1392, 1396-97 (Cal. 1973). Critical to criminalization is whether the defendant intended to return the property.

131. *See, e.g.*, SALTZBURG ET AL., *supra* note 3, at 504-15 (discussing the intent to permanently deprive another of his property, an element which is required to support a larceny conviction).

132. *See* Diamond, *supra* note 1. The author notes the following:

> [C]riminal law can be perceived usefully as a constellation of symbolic behavioral guideposts that project value and directional mandates. The immorality is not necessarily that of an individual transgressor or criminal, but the potentially inadvertent and, in a normative (but not positive) sense, non-culpable transgression of those directional boundaries. In essence, criminal law can be understood as a strict liability regime where personal condemnation is imposed on the transgressor for intentional *or* innocent boundary broaching.

Id. at 112.

133. *See, e.g.*, People v. Wendt, 539 N.E.2d 768 (Ill. App. Ct. 1989) (rejecting the defendant's argument that he was not guilty of tax evasion because he had a good faith belief that he was not subject to the income tax).

134. *See* MODEL PENAL CODE § 2.04(3) (Proposed Official Draft 1962) (listing as defenses situations where: (1) a law was not published, (2) reasonable reliance was placed on a statute later determined invalid, (3) reasonable reliance was placed on a court decision later overturned, and (4) reasonable reliance was placed on the advice of a public official).

135. *See Gordon*, 52 Ala. at 308; *see also* MODEL PENAL CODE § 2.04(1)(a) (1985) (providing a mistake of fact defense when the factual mistake negates the mens rea of the crime). *See, e.g.*, People v. Navarro, 160 Cal. Rptr. 692, 677-78 (Cal. App. 1979) (holding that a mistake of fact need not be reasonable to negate the intent of the crime).

reasonable mistakes of facts, the general contrast between mistake of fact and mistake of law is striking.

Once criminal law's primary role as the ideological transmission of social and cultural boundaries is acknowledged, the distinction between mistakes of fact and law becomes quite explainable. So long as the actor acknowledges the criminal boundaries, factual mistakes do not substantially challenge the ideological function of criminal law. Indeed, society, where its structural integrity is not at stake, ultimately is only enforcing acknowledgments that specific mens rea are prohibited. Mistakes of facts unlike mistakes of law do not challenge what the law requires. From a deterrence perspective, it would be difficult to justify not excusing reasonable mistakes of law.[136] The actor is not deterred since he did not know about the prohibition nor is his ignorance a reflection of negligence.[137] Furthermore, from a moral perspective, there is simply no culpability. The criminal has transgressed the boundaries, but he is not subjectively at fault. Yet even scholars that express strong dislike for crimes based on a negligence and certainly a strict liability mens rea in reference to mistakes of facts rarely challenge the strict liability imposed for ignorance of the law.[138]

V. THE ROLE OF IDEOLOGY

Criminal law is too often viewed as a utilitarian deterrence system which exacts a price for deviant conduct.[139] Scholars from an economic perspective have argued that criminal law supplements civil sanctions by providing a deterrent for judgment-proof defendants who have little to lose in civil litigation.[140] Alternatively, it has been argued that criminal law deters the wealthy from bypassing authorized market transactions by simply paying off a civil judgment.[141] The difficulty with these perspectives is that in large measure criminal law continues to punish those who are not necessarily aware that what

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136. *See* MODEL PENAL CODE § 2.04(1)(a) (1985) (providing that a mistake of law is a defense only if it negates the mens rea required by the statute).

137. *See, e.g.*, United States v. Klotz, 500 F.2d 580, 581-82 (8th Cir. 1974) (holding that defendants could not be convicted of knowingly failing to register unless it was proved that they were aware of their obligation to register). Despite the court's holding, most crimes do not require proof that a defendant was aware of the law and a mistake of law would thus provide no defense. *Id.* at 582.

138. *See* Thomas A. White, Note, *Reliance on Apparent Authority as a Defense to Criminal Prosecutions*, 77 COLUM. L. REV. 775, 784-89 (1977). The author notes that, "Only where . . . a person has made a reasonable effort to know the basis of legality of his actions, should he be granted a defense. An uninformed subjective belief in the legality of one's actions, unsupported by a reasonable basis for that belief, should not provide a defense." *Id.* at 799.

139. *See generally* JOHN STUART MILL, ON LIBERTY (1859).

140. *See, e.g.*, Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1198 (1985).

141. *See id.* at 1195.

they are doing is criminally proscribed. It is, of course, possible to marginalize as insignificant those who are punished, despite their ignorance of the law. However, the descriptive discrepancy between the economic theorists' explanations and the criminal law itself persists both in theory and practice.

Similarly, efforts to delineate civil and criminal law on the basis of a defendant's individual subjective fault falter.[142] Mens rea is often (although not always) required, but blameworthiness in theory is quite regularly excluded.[143] The use of objective negligence, non-exculpation for ignorance of the law, and strict liability crimes are too pervasive in theory and practice to be ignored.[144] Ultimately, criminal law is imposing ideological boundaries that society utilizes to organize and define itself. Criminal law cannot always provide specific or general deterrence, but it can enunciate boundaries beyond which social condemnation and potential exclusion is possible.

Criminal law is rich with symbolic imagery.[145] Convicted criminals are social demons, who while potentially redeemable through rehabilitation have nevertheless violated social limits, even if in some instances inadvertently.[146] Culpability is imposed regardless of fault, except where society defined the boundaries as requiring subjective fault.[147] Just as language conveys enormous information about a culture, the rhetoric of criminalization defines a society. While the rhetoric encompasses mens rea, it is, for the most part, objective and not subjective in theory.[148] Transgressors may quite often choose criminality, but it is not a prerequisite.

Through public trials, society utilizes the rich ritual of condemnation to define wrongs. There is admittedly great discretion in a prosecutor's agenda, particularly at the highest federal level. Ultimately, many prosecutors reflect and help define social ideology. The great criminal trials often reflect these debates over values.

VI. THE CRISIS IN CRIMINAL IDEOLOGY

There are limits to any socio-cultural instrument. The sociologist, Professor Kai Erikson, for example, has noted that society appears to accommodate an optimum level of criminal deviance.[149] Such deviance helps to define the society

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142. *See* Diamond, *supra* note 1.

143. *See id.*

144. *See id.* at 122.

145. *See* THURMAN W. ARNOLD, LAW AS SYMBOLISM, SOCIOLOGY OF LAW 45-51 (1969) (describing law as "a great reservoir of emotionally important social symbols").

146. *See, e.g.*, JEFFREY H. REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS AND CRIMINAL JUSTICE 116-40 (3d ed. 1990) (discussing the demonization of criminals).

147. *See supra* Part III (discussing transactional crimes).

148. *See* People v. Goetz, 497 N.E.2d 41, 47 (N.Y. 1986) (discussing the objective nature of a self defense determination in many jurisdictions).

149. KAI T. ERIKSON, WAYWARD PURITANS—A STUDY IN THE SOCIOLOGY OF DEVIANCE

by labeling what society appears not to tolerate. Erikson also notes, however, that the definition of criminal deviance attracts some would-be criminals who choose in a sense to be society's criminal.[150]

If the criminal law is a significant method of imposing cultural boundaries, its optimum use, one can surmise, requires selectivity. From a psychological perspective, to warn against everything is to warn against nothing. The ideology society intends to impose is arguably cluttered with excessive use of the criminal law, as if it were the ultimate tort—ready to deter if civil liability might not.[151]

Overcriminalization has been extensively explored,[152] particularly where it ventures into matters the observer finds inappropriately condemned. Obviously, the criminal justice system has limited resources. Furthermore, it is important that the criminal law not squander its moral authority or force too many to define themselves as deviant and hence no longer interested in subscribing to society's values.

One phenomenon that contemporary scholars have noted is the proliferation of criminal sanctions to address what were once only civil wrongs—the effective unification of torts and crimes.[153] The result is arguably a symbolic cluttering.[154] The ultimate ideology of society does not become embodied, because too many wrongs are defined as crimes. Historically, for example, only certain types of property acquisition was defined as criminal, a proposition that Professor Fletcher calls manifest criminality.[155] Today even the most technical transgression in capitalistic markets can be defined as criminal. If criminal law is a pricing system or trump card, perhaps such exploitation of criminal law is appropriate.[156] If, however, it is a mechanism by which society depicts values and the most fundamental, core ideology is conveyed, what is criminally wrong and right must be something more than what is merely civilly wrong and right. Undoubtedly, a society in transition fights over its criminal law, as it fights over the fabric of its ideology.

Nevertheless, change must not obscure the need to selectively condemn. The increasing proliferation of crimes competes for attention in society. Historically, the common law provided for only a handful of felonies. Crimes like murder, robbery, rape (narrowly defined) and larceny, for example, were all severely punished, initially with capital punishment.[157] Modern criminal codes are packed with multitudes of felonies that can entangle many. While in some ways this can equalize otherwise discriminatory emphasis, there is a social cost to such

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(1966).

150. *See id.*

151. *See* EPSTEIN, *supra* note 9.

152. *See, e.g.*, 62 H.L.A. HART, IMMORALITY AND TREASON IN THE LISTENER 162-63 (1959).

153. *See* EPSTEIN, *supra* note 9.

154. *See* Diamond, *supra* note 1.

155. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 115-18, 232-33 (1978).

156. *See, e.g.*, Cooter, *supra* note 9, at 1548-49; Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1232-35 (1985).

157. *See* Posner, *supra* note 140, at 1202, 1212.

proliferation. Already, many crimes of violence offer complex ideological messages. As previously discussed, the line between justified and criminal killing can be subtle.[158] If criminal law is to be successful in its communicative and persuasive function, it can not overly clutter its message.

Both the economic *and* moral model of criminal law risk dysfunctioning criminal law. By emphasizing the potential deterrence criminal law provides, the economic model invites criminal as opposed to civil sanctions, whenever the criminal threat appears an efficient instrument.[159] Indeed, the economic model appears to have had its impact on the epidemic of crimes that have been conceived that go well beyond an increasing concern for a non-violent social order. Society must ultimately be viewed holistically; to be effective the criminal law must have only so many commandments. It is not simply an issue of deterrence but one of cultural indoctrination. The utilitarian role of criminal law can not be viewed *too* narrowly.

The subjective fault model also, however, misstates criminal law.[160] Despite the gallant leadership of the Model Penal Code, the criminal law in theory and in practice punishes and condemns non-culpable conduct. Reasonable ignorance of the law is generally not exculpatory.[161] Objective negligence is an entrenched basis for criminality.[162] In the absence of legal insanity, the failure to perceive and conform to the law is condemnable. To define the criminal law system in purely culpable terms mischaracterizes the regime and only serves to distort and obscure its role. It is unfair to characterize all criminals as either intentionally or even negligently transgressing criminal boundaries since reasonable ignorance of those boundaries is non-exculpatory. This is not to deny that there is a strong correlation between moral fault and criminality, but in theory, although much less in practice, the correlation systematically deviates in many respects. Furthermore, a criminal law regime based on culpability encourages society to condemn culpability without the need to select and criminalize only what society will define as its fundamental wrongs. Criminal law is not simply condemning fault but also defining core values.

The ideological model of criminal law better explains what otherwise appear to be theoretical anomalies in substantive criminal law. Subjective moral fault is inconsistent with basic tenants of substantive criminal law. Individual moral culpability is not necessarily a prerequisite to criminal condemnation. Similarly, the economic pricing theories would require that criminal law penalties address only intentional and not inadvertent transgressions to persuasively characterize the criminal system as a pricing method to deter wrongdoing.

In contrast, an ideological transmission model of criminal law can explain the coexistence of culpable mens rea crimes, traditional strict liability crimes with severe penalties, the pervasive use of negligence in criminal law in lieu of

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158. *See, e.g.*, People v. Goetz, 497 N.E.2d 41, 46-52 (N.Y. 1986).

159. *See, e.g.*, Cooter, *supra* note 9, at 1548-49; Shavell, *supra* note 156, at 1232-35.

160. *See* Diamond, *supra* note 1, at 126-27.

161. *See, e.g.*, MODEL PENAL CODE § 2.04(1) (1985).

162. *See supra* Parts I.A, II.

subjective mens rea, and modern strict liability crimes. Further, such a model explains the criteria by which different standards are applied to different crimes.

Bigamy and statutory rape are structural crimes which historically defined the basic socio-cultural organization of the state.[163] Monogamy defines the family and any deviation is condemned and severely punished. Mens rea is irrelevant. Similarly, the family structure is enforced by the common law's imposition of strict liability in statutory rape.[164] Transgressing the basic family structure in society, by challenging the father's control over his unemancipated daughter, was unexcusable. The original purpose of statutory rape—protecting the father's exclusive control and value of his virgin daughter—has evolved arguably to protecting the minor's interest in avoiding exploitation.[165] Nevertheless, the resistance of most states to requiring any culpability as a prerequisite to punishing statutory rape suggest that a family structure encompassing a spousal sexual relationship and minor children devoid of sexual entanglement remains too fundamental to be concerned with exculpatory mitigation. Furthermore, the conception of the family unit requires a single spousal relationship. The ultimate social and political organization of the state is built on a particular family structure which presumably has implications to a society's fundamental organization.

In a similar manner, public welfare crimes condemn, without reference to mens rea, commercial deviations that challenge the structure of society.[166] Commercial discourse requires adherence to weight standards, food purity and the like.

Transactional crimes, on the other hand, regulate physical acts in the contexts of specific mens rea.[167] This mens rea must not, however, be confused with requisite culpability. Instead, the mens rea is providing more selective condemnation of acts which in some circumstances are justified.

Criminal law is ultimately different from tort and other civil law, not because it demands more culpability but because of the condemnation it imposes on its transgressors.[168] The imagery of criminal law, including the public ritual of its trials, defines a society's core ideology.[169] The crisis in the ideology of crime is the proliferation of crime and the failure to select sparingly from culpable civil wrongs. The danger is that too much condemnation dilutes and obscures the fundamental ideological boundary society needs to protect.

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163. *See supra* Part I.A.

164. While the Model Penal Code and some states reject strict liability in statutory rape, most states adhere to strict liability.

165. *See supra* note 21.

166. *See supra* Part II.

167. *See supra* Part III.

168. *See* ERIKSON, *supra* note 149, at 49.

169. *See id.*

THE COMMON FUND DOCTRINE: COMING OF AGE IN THE LAW OF INSURANCE SUBROGATION

JOHNNY PARKER*

INTRODUCTION

The "American Rule"—the euphemistic title given to the attorney fee allocation doctrine associated with American jurisprudence—has been the subject of much debate and criticism.[1] Pursuant to the "American Rule," each party is obligated to pay its own attorney's fees, regardless of the outcome of the litigation.[2] So much has been said and written on the subject of attorney fee allocation in America that the rule pertaining to the subject is often quoted

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1. *See, e.g.*, Leonard R. Avilla, *Shall Counsel Fees Be Allowed?*, 13 CAL. ST. B.J. 42 (1938); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974); Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849 (1929); Gregory A. Hicks, *Statutory Damage Caps are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions*, 49 LA. L. REV. 763 (1989); Calvin A. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984); Philip J. Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969); Charles T. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); Gerald T. McLaughlin, *The Recovery of Attorney Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Phyliss A. Monroe, Comment, *Financial Barriers to Litigation: Attorney Fees and Problems of Legal Access*, 46 ALB. L. REV. 148 (1981); Thomas D. Rowe, Jr., *Predicting the Effect of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139 (1984); Thomas E. Shea, *Closing Pandora's Box: Litigation Economics*, 22 CAL. W. L. REV. 267 (1986); Kenneth W. Starr, *The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189 (1986); William B. Stoebuck, *Counsel Fees Included in Cost: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Erik B. Thueson, *Attorney Fees: Slipping from the American Rule Strait Jacket*, 40 MONT. L. REV. 308 (1979); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993); Jon S. Hoak, Note, *Attorney Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717 (1976).

2. *See* MARY F. DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES ¶ 1.02[1] (1997). By contrast, the "English Rule" provides that the prevailing party can collect its attorney fees from the loser. The "English Rule," unlike the "American Rule," allows for the shifting of legal fees to the losing party in the litigation. *See* Herbert M. Kritzer, *The English Rule*, A.B.A. J., Nov. 1992, at 54, 55. In virtually every other nation of the world, courts have awarded and continue to award attorney fees to the prevailing party either as an item of compensatory damages or cost. *See* Ehrenzweig, *supra* note 1, at 793.

without citation.[3] Further, the bulk of the discourse concerning the rule is critical in nature and tends to be based on theory or conjecture.[4] Consequently, anyone looking for something to debate would find the subject of allocation of attorney fees in America an attractive topic.

Rather than re-exploring charted waters, this Article will avoid debating the pros and cons of the "American Rule" and go beyond theory and examine the common fund exception to the "American Rule" in the limited context of insurance subrogation. This Article focuses on the substantive requirements of the common fund doctrine and examines the circumstances under which courts have traditionally awarded attorney fees to a subrogor's attorney. This Article is not an attempt at an exhaustive analysis of all the exceptions to the "American Rule" of not awarding attorney fees to a prevailing party. Rather, its purpose is to provide an in-depth analysis of the fund doctrine and to serve as an aid to the insurance practitioner in determining when an award of fees should be available in the context of insurance subrogation.

Part I of this Article chronicles the historic development of the common fund doctrine. Part II details the contours and discusses the policy objectives sought to be achieved by the doctrine. Part III examines the law of insurance subrogation. This Part also explores attempts by the insurance industry to preclude common fund application. Part IV examines the nuances of the fund doctrine in the context of insurance subrogation law.

The "American Rule" has never constituted an absolute bar to the shifting of attorney fees. From early common law days, courts have recognized several exceptions to the general principle that each party should bear the expenses of his own legal representation.[5] These exceptions fit into one of four categories:

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3. *See supra* note 1.

4. *See* John F. Vargo, *The American Rule On Attorney Fee Allocation: The Injured Person's Access To Justice*, 42 AM. U. L. REV. 1567 (1993). The justifications given for the "American Rule" are many and include such explanations as: (1) given that litigation is uncertain, one should not be penalized for bringing or defending a lawsuit; (2) if the penalty for losing a lawsuit included paying the opponent's counsel, the poor would be unjustly discouraged from instituting actions to vindicate their rights; (3) the time, expense and difficulty of litigating the reasonableness of attorney fees would impose substantial burdens on judicial administration; (4) responsibility for one's own legal expenses is thought to promote settlement; and (5) attorney fees and costs are not considered actual damages because they are not the legitimate consequences of the tort or breach of contract sued upon. *See* DERFNER & WOLF, *supra* note 2, ¶ 1.03.

5. *See* McCallie v. McCallie, 660 So. 2d 584 (Ala. 1995); London v. Green Acres Trust, 765 P.2d 538 (Ariz. Ct. App. 1988); Gill v. Transcriptions, Inc., 892 S.W.2d 258 (Ark. 1995); Bunnett v. Smallwood, 793 P.2d 157 (Colo. 1990); Marsh v. Solomon, 529 A.2d 702 (Conn. 1987); Oliver T. Carr Co. v. United Tech. Communications Co., 604 A.2d 881 (D.C. Cir. 1992); State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830 (Fla. 1993); Thornley v. Sanchez, 857 P.2d 601 (Haw. Ct. App. 1993); *In re* SRBA, 912 P.2d 614 (Idaho 1995); Leahy Realty Corp. v. American Snack Foods Corp., 625 N.E.2d 956 (Ill. App. Ct. 1993); Willie's Constr. Co. v. Baker, 596 N.E.2d 958 (Ind. Ct. App. 1992); Smith v. Board of Supervisors, 320 N.W.2d 589 (Iowa 1982); Barber v. Town of Fairfield, 460 A.2d 1001 (Me. 1983); Collier v. MD-Individual Practice Ass'n, 607 A.2d

recovery provided by statute;[6] recovery pursuant to a contract provision;[7] reimbursement ordered pursuant to equity rule;[8] and recovery as an item of cost or damages to a wronged party involved in collateral litigation.[9] The slow but steady erosion of the historic "American Rule" pursuant to a court's inherent equity power is changing forever the nature of litigation and the judicial function in many instances.[10] This is especially true with regard to insurance subrogation

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537 (Md. 1992); Bournewood Hosp., Inc. v. Massachusetts Comm. Against Discrimination, 358 N.E.2d 235 (Mass. 1976); Burnside v. State Farm Fire & Cas. Co., 528 N.W.2d 749 (Mich. Ct. App. 1995); Anderson v. Medtronic, Inc., 382 N.W.2d 512 (Minn. 1986); Aqua-Culture Tech., Ltd. v. Holly, 677 So. 2d 171 (Miss. 1996); David Ranken, Jr. Technical Inst. v. Boykins, 816 S.W.2d 189 (Mo. 1991); First Nat'l Bank of Glaskow v. First Nat'l Bank of Montana N.A., 857 P.2d 726 (Mont. 1993); Barrett v. Baird, 908 P.2d 689 (Nev. 1995); *In re* Thomas, 651 A.2d 1063 (N.J. Super. Ct. App. Div. 1995); Turpin v. Smedinghoff, 874 P.2d 1262 (N.M. 1994); Gordon v. Marrone, 590 N.Y.S.2d 649 (N.Y. Sup. Ct. 1992); Nottingdale Homeowners Ass'n v. Darby, 514 N.E.2d 702 (Ohio 1987); Booker v. Sears Roebuck & Co., 785 P.2d 297 (Okla. 1989); Jones v. Muir, 515 A.2d 855 (Pa. 1986); Pullman Standard, Inc. v. Abex Corp., 693 S.W.2d 336 (Tenn. Ct. App. 1985); Baja Energy, Inc. v. Ball, 669 S.W.2d 836 (Tex. App. 1984); Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759 (Utah 1994); Leiter v. Pfundston, 556 A.2d 90 (Vt. 1988); Mullins v. Richland Nat'l Bank, 403 S.E.2d 334 (Va. 1991); Rettkowski v. Department of Ecology, 910 P.2d 462 (Wash. 1996); Hayseed, Inc. v. State Farm Fire & Cas. Co., 352 S.E.2d 73 (W. Va. 1986); DeChant v. Monarch Life Ins. Co., 547 N.W.2d 592 (Wis. 1996); Snodgrass v. Rissler & McMurray Co., 903 P.2d 1015 (Wyo. 1995); *see also* Chambers v. Nasco, Inc., 501 U.S. 32 (1991); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Trustees v. Greenough, 105 U.S. 527 (1881).

6. *See supra* note 5. For a list of over 200 federal statutory fee provisions, see generally DERFNER & WOLF, *supra* note 2, ¶¶ 5.01-5.05.

7. *See supra* note 5.

8. The equity exceptions to the "American Rule" consist of the following: common fund doctrine, substantial benefit/common benefit doctrine, private attorney general theory, and bad faith, obdurate behavior rule. Each of these exceptions share a uniquely federal common law origin. *See* Chambers v. Nasco, Inc., 501 U.S. 32 (1991) (bad faith rule); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (private attorney general rule); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (substantial benefit doctrine); Trustees v. Greenough, 105 U.S. 527 (1881) (common fund doctrine).

9. There is a substantial body of case law which supports the view that where the wrongful act of one person has caused litigation between another and a third person or has made it necessary for the other person to incur legal expenses to protect his interest, those expenses, including attorney's fees, are recoverable. *See, e.g.*, *Collier*, 607 A.2d at 537; Willard v. Paracelsus Health Care Corp., 681 So. 2d 539 (Miss. 1996); Nix v. Nix, 862 S.W.2d 948 (Mo. Ct. App. 1993); Albright v. Fish, 422 A.2d 250 (Vt. 1980); Wells v. Aetna Ins. Co., 376 P.2d 644 (Wash. 1962).

10. Pursuant to the "American Rule" a prevailing party cannot recover his legal fees, whether classified as "costs" or "damages," unless there is an exception to the general rule. The classification of attorney fees as either "costs" or "damages" does at times alter the responsibility of the court and jury. For a good discussion concerning the difficulty of classifying attorney fees,

law and is due in significant part to the fact that the "Rule" is based more on precedence than policy.[11]

I. THE HISTORICAL DEVELOPMENT OF THE COMMON FUND DOCTRINE

The common fund doctrine found its way into American jurisprudence in the case of *Trustees v. Greenough*.[12] In *Greenough*, Francis Vose, a large holder of bonds of the Florida Railroad Company filed suit on behalf of himself and other bondholders against the trustees of the Internal Improvement Fund of Florida and various other named defendants. The fund consisted of ten or eleven million acres of land which had been conveyed by the state as security for a bond issue of the Florida Railroad Company. Vose charged the trustees of the fund with waste and destruction of the fund by selling the land at nominal prices and failing to provide for the payment of interest or sinking fund on the bonds. His bill prayed that the fraudulent conveyances be set aside, the trustees be enjoined from selling more lands, and a receiver be appointed to manage the fund.

After more than a decade of vigorous and expensive litigation, Vose's lawsuit resulted in the restoration of a large amount of the trust fund, the appointment of a court appointed receiver to manage the fund, and realization of a significant amount of money and dividends to the bondholders.[13] Vose, without assistance from the other bondholders, bore the entire financial burden of the litigation and advanced the money used to reach the successful results. Therefore, Vose petitioned the court for reimbursement of his expenses from the fund which, as a result of the judicially appointed receiver, was still within the control of the court. Justice Bradley, writing for a majority of the Court, observed:

> But in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust: and where all this has been done; and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings,—if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest.[14]

The Court's analogy of Vose to a trustee alone would have supported application

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see DERFNER & WOLF, *supra* note 2, ¶ 1.01[2].

11. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 639 (1974).

12. 105 U.S. 527 (1881).

13. *Id.* at 529.

14. *Id.* at 532.

of the rule that a trust estate must bear the expenses of its administration.[15] However, the Court further premised its decision on equity because, as Justice Bradley noted, to deny Vose reimbursement for expenses

> would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.[16]

The influence of equity on the Court's holding in *Greenough* was significant.[17] Equity, however, is never without limit and the Court recognized this fact in distinguishing between reimbursing Vose for legal expenses as a client and reimbursing Vose for his own time and expenses.[18] The latter expenses, the Court concluded, lacked both reason and support for reimbursement.[19]

Less than four years after the *Greenough* decision was rendered, its boundaries were tested. In *Central Railroad & Banking Company v. Pettus*,[20] the Western Railroad Company, an Alabama corporation, purchased and took possession of the railroad and all other property of the Montgomery and West Point Railroad Company. Western agreed, as a condition of the sale, to assume the payment of all outstanding debts and obligations of West Point. Several years after this transaction, secured creditors of Western Railroad Company initiated a suit to procure a sale of the property of said railroad, including that purchased from the former Montgomery and West Point Railroad Company. A sale was ordered subject to a lien in respect to the property formerly owned by West Point in favor of holders of its mortgage bonds.

Thereafter, several holders of bonds of West Point, who were not secured by mortgage, hired Pettus & Dawson and Watts & Sons to represent them in litigation against Western Railroad Company. Plaintiffs sought to have their unsecured mortgage interest in the former Montgomery and West Point Railroad declared superior to any mortgages executed by Western Railroad Company. Ultimately, the plaintiffs were successful in having their unsecured mortgage interest adjudged superior to any executed by Western Railroad Company.[21]

In *Pettus*, unlike *Greenough*, the claim on the fund was asserted by the

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15. *Id.*
16. *Id.*
17. *Id.* at 537.
18. *Id.* at 538.
19. *Id.* The Court concluded that if Vose was reimbursed for private expenses and personal services it would tempt parties to intermeddle in the management of funds in which they held only a creditor's interest. *Id.*
20. 113 U.S. 116 (1885).
21. *Id.* at 119.

attorneys directly. Unsecured creditors, who had not retained but who had benefitted from the attorneys' services, objected to the claim for fees on the grounds that the attorneys had already been compensated by their clients pursuant to a contract.[22] The Court, in response to this contention, cavalierly noted that the unsecured creditors who retained the attorneys understood that the attorneys believed

> they had the right to demand, and would demand, such additional compensation as was reasonable, in respect of unsecured creditors who accepted the fruits of their labor by filing claim; that, but for this understanding, appellees would have stipulated a larger compensation than that agreed to be paid by their particular clients . . . .[23]

The absence of a contract of employment between the attorneys and the passive unsecured creditors was of little consequence to the Court

> [w]hen the litigation was commenced, the unsecured bonds of the Montgomery & West Point Railroad Company was [sic] without any value in the financial market. That litigation resulted in their becoming worth all, or nearly all, that they called for. The creditors who are entitled to the benefits of the decree had only to await its execution in order to receive the full amount of their claims; and that result was due to the skill and vigilance of the appellees, so far as the result of litigation may, in any case, be referred to the labors of counsel.[24]

The Court further observed, in response to there not being a contract for services, that the creditors had notice, by the bill, that the suit was a class action for the benefit of all similarly situated persons.[25] Consequently, those who accepted "the fruits of the labors" of the attorneys should expect to be called upon to contribute to the expenses including reasonable attorney fees.[26] To secure their rights to fees, the lawyers were given a lien on the railroad assets which had been saved by the order.

The impact of the *Pettus* decision on the development of the common fund doctrine was astounding. One scholar notes that:

> [t]he Court seemed to be cheerfully unaware that it had leaped across a gulf. The *Greenough* case three years before had approved the claim of a client for contribution to the litigation costs that he had incurred but under the usual rule could not recover from his losing opponents. The *Pettus* case totally transformed this into an independent right of the *lawyer*, reinforced by lien, to an extra reward so that he might share the wealth of strangers. The lawyer was suddenly thought of as producer of

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22. *Id.* at 125.
23. *Id.*
24. *Id.* at 126.
25. *Id.* at 126-27.
26. *Id.* at 127.

> this wealth, though he did nothing more than perform his contract with his own client, and furthermore had been paid by his client in full the sum he had agreed to accept . . . .
>
> The net result is that either client or lawyer can secure a charge on a *Greenough*-type fund for legal services rendered in successful litigation. In the rare case where the client sues it is taken for granted, and *Greenough* itself implied, that the claim for legal services is a first charge on the fund and must be satisfied before any distribution occurs. The same priority is assumed for the lawyer's own claim when asserted independently, and where the issue of priority rises to the surface this is made explicit. The lawyer's claim is independent in the sense that he can assert it, though foreclosure of his lien may destroy the fund or so deplete it that there is nothing left to pay his own client.[27]

The next significant step in the evolution of the common fund doctrine was taken in the case of *Sprague v. Ticonic National Bank.*[28] Although the holding in *Sprague* itself is of little consequence, the Court's broad reasoning went far beyond that required under the facts of the case. Consequently, it has displaced, at least in terms of frequency of citation, both *Greenough* and *Pettus*. In *Sprague*, petitioner deposited in trust certain funds with the Ticonic Bank. Ticonic subsequently was taken over by People's National Bank which acquired all the assets, including petitioner's deposits and assumed all indebtedness of the Ticonic Bank. After both banks went into receivership, petitioner filed a bill against the banks to impress upon the proceeds of the bonds a lien for her trust deposits. This proceeding terminated in favor of petitioner, who then sought contributions for legal expenses, including attorneys fees, from the beneficiaries of fourteen other trusts that had been similarly situated. Petitioner alleged that by vindicating her claim to a lien on the proceeds, she had established as a matter of law the right of the beneficiaries of the similarly situated trusts to recover.[29]

In *Sprague*, the Court had in its possession an identifiable fund, even though none of the bonds had been allocated to the individual beneficiaries. Consequently, *Sprague* did not fit precisely into either of the two types of cases to which the Court had previously applied the common fund doctrine.[30] Nonetheless, the Court found that *Sprague* presented a variation of the situation where a petitioner's litigation benefits a group which he does not profess to represent.[31] This fact, however, does not necessarily explain why the Court did

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27. John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1603-04, 1606-07 (1974) (emphasis in original).

28. 307 U.S. 161 (1939).

29. *Id.* at 163.

30. Justice Frankfurter noted that the doctrine had been applied to two types of cases: where the complainant professes to sue for the common interest of a group and where a fund is created for a group though the complainant did not profess to represent the group. *Id.* at 166.

31. *Id.*

not rely upon its previous holdings in both *Greenough* and *Pettus*—where a fund exists in the control of a court, where benefits accrue to others, and where the client prosecuted the action at her own expense, these were sufficient reasons for allowing a claimant to seek reimbursement for legal expenses. Though Sprague, in her litigation, did not purport to represent the interest of a group, the Court, relying upon the principles of stare decisis[32] and equity,[33] noted that such allowances were appropriate in exceptional cases and for dominating reasons of justice.[34] This fact, along with the Court's reliance upon and analysis of its inherent equity power, suggests that the judiciary possesses broad discretion in ascertaining those circumstances that require an additional dosage of equity.[35] Because the power to award fees "is part of the original authority of the chancellor to do equity in a particular situation,"[36] courts have not hesitated to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery."[37]

II. THE DOCTRINE ARTICULATED

The common fund doctrine variously has been referred to as the trust fund doctrine, equitable fund doctrine or fund doctrine.[38] Despite the variations in

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32. In view of the consequences of stare decisis, the petitioner by establishing her claim necessarily established the claims of 14 other trusts pertaining to the same bonds. *Id.*

33. The inherent equity power of courts to award fees to the prevailing party is of English common law ancestry. JOSEPH STORY, 1 EQUITY JURISPRUDENCE, §§ 57-58 (14th ed. 1918).

34. *Sprague*, 307 U.S. at 167.

35. This seemed to be the case despite the fact that the court expressly noted that such awards "are appropriate only in exceptional cases and for dominating reasons of justice." *Id.* at 167. *See also* Dawson, *supra* note 27, at 1610 (noting that the *Sprague* decision may be viewed "as a part of a sweeping assertion of the inherent power of equity courts to redistribute the costs of litigation").

36. *Sprague*, 307 U.S. at 166.

37. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970); *see also* Hall v. Cole, 412 U.S. 1, 5 (1973); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

38. *See* Goodrich v. E.F. Hutton Group, Inc., 681 A.2d 1039, 1044 (Del. 1996); Oklahoma Tax Comm'n v. Ricks, 885 P.2d 1336, 1339 (Okla. 1994).

The common fund doctrine is more than an exception to the "American Rule." The doctrine also effectively operates as an exception to the requirement that an attorney/client relationship must exist in order for an attorney to be entitled to compensation. *See* Commercial Union Ins. Co. v. Scott, 158 S.E.2d 295 (Ga. Ct. App. 1967); Kindred v. City of Omaha Employees' Retirement Sys., 564 N.W.2d 592 (Neb. 1997); United Servs. Auto Ass'n v. Hills, 109 N.W.2d 174 (Neb. 1961); Hatcher v. United States Nat'l Bank, 643 P.2d 359 (Or. Ct. App. 1982).

Some courts use the term "common fund" to describe the process of awarding fees where the attorney's services have not created, protected or preserved a fund. This is a misuse of the term "common fund." The process of granting an award of fees in the absence of a fund is better and more accurately referred to as the substantial benefit/common benefit exception to the "American Rule." This exception is a derivative of the common fund doctrine. It is justified on the theory that

nomenclatures the primary purpose of the doctrine is universally accepted as one which:

> provides that when a party through active litigation creates, reserves or increases a fund, others sharing in the fund must bear a portion of the litigation costs including reasonable attorney fees. The doctrine is employed to spread the cost of litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone and the "stranger" (i.e. passive) beneficiaries do not receive their benefits at no cost to themselves.[39]

The policy which perpetuates the common fund doctrine is firmly rooted in equity.[40] Nevertheless, the doctrine has been applied only in a few well defined

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to allow others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation would be to enrich the others unjustly at the plaintiff's expense. *See Hall*, 412 U.S. at 5-6; *Mills*, 396 U.S. at 392. Some courts use the term "valuable service" as a synonym for substantial benefit. *See also* Southerland v. International Longshoremen's & Warehousemen's Union, 845 F.2d 796, 799 (9th Cir. 1987).

Initially a two-factor test was developed to determine application of the substantial benefit test, which consisted of: (1) whether the litigation conferred a substantial benefit on the members of an ascertainable class; and (2) whether the court's jurisdiction over the subject matter makes possible an award that will operate to spread the costs proportionately among the class. *See Hall*, 412 U.S. at 5; *Mills*, 396 U.S. at 393-94. The United State Supreme Court reaffirmed the substantial benefit doctrine of *Hall* and *Mills* in *Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 240 (1975). Therein, the Court used a three prong standard: (1) the class of beneficiaries is "small in number and easily identifiable;" (2) "the benefits could be traced with some accuracy;" and (3) the costs could be shifted "with some exactitude" to those who actually benefitted from the litigation. *Id.* at 264-65.

The requirement that the benefit to the class be substantial, in lieu of a fund, is intended to discourage nuisance suits. In order to justify an award, the benefits need not be capable of being measured in monetary terms. However, a substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects an abuse which would prejudice the rights and interests of the class or affect the enjoyment or protection of an essential right to the class. Whether the benefit is substantial is a question of law. *See, e.g*, Schechtman v. Wolfson, 244 F.2d 537, 540 (2d Cir. 1957); Bosch v. Meeker Coop. Light & Power Ass'n, 101 N.W.2d 423, 426-27 (Minn. 1960).

39. Means v. Montana Power Co., 625 P.2d 32, 37 (Mont. 1981); *see also* Serrano v. Priest, 569 P.2d 1303, 1310-11 (Cal. 1977); Dennis v. State, 451 N.W.2d 676, 687 (Neb. 1990); Guild, Hagen & Clark, Ltd. v. First Nat'l Bank, 600 P.2d 238 (Nev. 1979).

40. The policy underlying the common fund doctrine is based on:

> fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly

situations.[41]

The common fund doctrine requires the existence of a fund. The creation and/or preservation of a trust estate,[42] class actions,[43] and insurance subrogation proceeds,[44] illustrate the types of cases subject to fund creation or preservation.[45] However, to justify an award of fees under the doctrine, the claimant must have brought suit to create, preserve, increase or protect a fund which benefits himself and others.[46] The fund must also be within the control of the court and bear such a relationship to the benefitted class that the award will operate to spread the costs of litigation proportionately and, with some degree of exactitude, among identifiable beneficiaries of the claimant's success.[47] The "within the control of the court" requirement is met if the court has, at a minimum, constructive custody or control over the fund.[48] The test for control is whether the court has the power to assess a fee proportionately and accurately from each of the passive beneficiaries' traceable portion of a distinct fund.[49] The basic tenets of the fund

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compensated should his efforts be successful.

First Nat'l Bank, 600 P.2d at 239 (quoting *In re* Stauffer's Estate, 346 P.2d 748, 752-53 (Nev. 1959)); *see also Alyeska Pipeline Co.*, 421 U.S. at 257; City of San Francisco v. Sweet, 38 Cal. Rptr. 2d 620, 626 (1995); *Means*, 625 P.2d at 37 ("The common fund doctrine is rooted in the equitable concepts of quasi-contract, restitution and recapture of unjust enrichment."); Washington Fire & Marine Ins. Co. v. Hammett, 377 S.W.2d 811 (Ark. 1964). *See generally* 20 AM. JUR. 2D *Costs* § 85 (1985); J.F. Riley, Annotation, *Right of Attorney for Holder of Property Insurance to Fee Out of Insurer's Share of Recovery from Tortfeasor*, 2 A.L.R.3d 1441 (1984); 7A C.J.S., *Attorneys & Clients* § 334 (1980).

41. *See infra* CONCLUSION.

42. *See Sprague*, 307 U.S. at 161; United States v. Equitable Trust Co., 283 U.S. 738 (1931); Harrison v. Perea, 168 U.S. 311 (1897).

43. *See, e.g.*, Edelman & Combs v. Law, 663 So. 2d 957 (Ala. 1995); Montalvo v. Chang, 641 P.2d 1321 (Haw. 1982); Brundidge v. Glendale Fed. Bank, 659 N.E.2d 909 (Ill. 1995).

44. *See infra* Part IV.

45. *See also* Oklahoma Tax Comm'n v. Ricks, 885 P.2d 1336, 1340 (Okla. 1994) ("The existence of a judgment, an effect upon real property and court-ordered fund segregation" also illustrate types of cases which reflect fund creation and preservation.).

46. This is said to be the test for determining application of the common fund doctrine. *See* Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 421 U.S. 240, 257-58 (1975); Sierra Club v. Louisiana Dep't of Wildlife & Fisheries, 560 So. 2d 976, 978 (La. Ct. App. 1990); *see also* Crane Towing v. Gorton, Inc., 570 P.2d 428, 437 (Wash. 1977).

47. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 394-95 (1970); *Alyeska Pipeline Servs. Co.*, 421 U.S. at 265 n.39.

48. *See* Van Holt v. Izumo Taisha Kyo Mission, 355 P.2d 40, 49 (Haw.), *aff'd on reh'g*, 355 P.2d 44 (Haw. 1960); Flynn v. Kucharski, 306 N.E.2d 726, 731-32 (Ill. App. Ct. 1973); Milster v. City Council, 47 S.E. 141, 141-42 (S.C. 1904).

49. *See* Townsend v. Edelman, 518 F.2d 116, 123 (7th Cir. 1975); Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1122-23 (9th Cir. 1981); District of Columbia v. Green, 381 A.2d 578, 581 (D.C. 1977); City of East Peoria v. Tazewell County, 308 N.E.2d 824, 825 (Ill. App. Ct. 1974).

doctrine have been incorporated into a prima facie case requiring proof of:

> (1) The existence of a fund over which the court has jurisdiction and from which fees can be awarded; (2) The commencement of litigation by one party which is terminated successfully; (3) The existence of a class which received, without otherwise contributing to the lawsuit, substantial benefits as a result of the litigation; (4) The creation, preservation, protection or increase of the fund as a direct and proximate result of the efforts of counsel for that party; and, (5) A reasonable relationship between the benefit established and the fees incurred.[50]

In the context of insurance subrogation cases, the prima facie case has been condensed to require: (1) the attorney has been compensated from a common fund; (2) the attorney's services must have benefitted that fund; and, (3) the party that seeks the fee and the party that is to be charged with the fee must have some interest in the fund.[51] This prima facie case can be further compared to that of Illinois which allows an attorney to collect fees under the common fund doctrine if: (1) the fund from which fees are sought was created as a result of the legal services performed by the attorney; (2) the claimant of the fund did not participate in its creation; and (3) the claimant benefitted or will benefit from its creation.[52] Despite nuances in the language used to describe the appropriate circumstances under which the common fund doctrine is applicable, both prima facie cases reflect that courts are predisposed to examine the source of the fund and the significance of the contribution of the attorney as it relates to the creation, preservation, or protection of same versus that of the beneficiary. These considerations operate quantitatively on balance with the end sought to be achieved—equity.

The party seeking application of the fund doctrine is entitled to be awarded a reasonable fee. Courts have broad discretion in determining what constitutes a reasonable fee award.[53] They tend, however, to rely upon one of three standards to measure the reasonableness of fee awards in common fund cases. These standards are the fee arrangement set out in the attorney/client contract,[54]

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50. Community Nat'l Bank v. Rishoi, 567 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 1990).

51. Henley & Clarke v. Blue Cross-Blue Shield, 434 So. 2d 274, 276 (Ala. Civ. App. 1983).

52. Tenny v. American Family Mut. Ins. Co, 470 N.E.2d 6, 7 (Ill. App. Ct. 1984). *Cf.* Blake v. Cannon, 439 S.E.2d 302, 304 (S.C. Ct. App. 1993) (setting out prima facie case followed in South Carolina).

53. *See infra* note 52; *see also* Gigot v. Cities Serv. Oil Co., 737 P.2d 18, 25 (Kan. 1987); Sant v. Perronville Shingle Co., 146 N.W. 212, 215 (Mich. 1914); *In re* Alcolac, Inc., 903 S.W.2d 680, 682 (Mo. Ct. App. 1995) (court's discretion is not without limits).

54. This is the measure used in the vast majority of insurance subrogation cases. *See, e.g.*, Lyons v. Geico Ins. Co., 689 So. 2d 182, 183-84 (Ala. Civ. App. 1997); Commercial Standard Ins. Co. v. Combs, 460 S.W.2d 770, 772-73 (Ark. 1970); Washington Fire & Marine Ins. Co. v. Hammett, 377 S.W.2d 811, 813 (Ark. 1964); City of San Francisco v. Sweet, 38 Cal. Rptr. 2d 620, 621-22 (Cal. Ct. App. 1995); Forsyth v. Southern Bell Tel. & Tel. Co., 162 So. 2d 916, 919 (Fla. Dist. Ct. App. 1964); Foremost Life Ins. Co. v. Waters, 337 N.W.2d 29, 32 (Mich. Ct. App. 1983);

the lodestar method or a percentage of the fund calculation.[55] The standard used often depends upon the nature of the litigation. Nevertheless, the award is recoverable from either the fund or directly from the passive beneficiaries and not the losing party.[56] The practice, however, is to tax the award against the

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Amica Mut. Ins. Co. v. Maloney, 903 P.2d 834, 841 (N.M. 1995); State Farm Mut. Auto. Ins. Co. v. Elkins, 451 S.W.2d 528, 530 (Tex. App. 1970).

The cases uniformly refer to the attorney client contract as the measure of recovery without detailed analysis. The law, with regard to determining reasonable attorney fees in general, as well as that in regards to the common fund, is clear that the contract is not the sole factor to be considered. *See* Barreca v. Cobb, 668 So. 2d 1129 (La. 1996); United Servs. Auto. Ass'n v. Hills, 109 N.W.2d 174 (Neb. 1961); *Amica Mut. Ins. Co.*, 903 P.2d at 834; State Farm Mut. Auto. Ins. Co. v. Geline, 179 N.W.2d 815 (Wis. 1970).

The discretion of courts to award fees is not limited by the attorney/client contract. The court may override or ignore the contract under appropriate circumstances. *See, e.g.*, Montalvo v. Chang, 641 P.2d 1321, 1327 (Haw. 1982); *Gigot*, 737 P.2d at 23; *Sant*, 146 N.W. at 215.

55. There has been much litigation over the issue of whether the lodestar method or the percentage of the fund measure should be used to measure the reasonableness of the fee award in common fund cases. The Tenth and Eleventh Circuit Courts of Appeals and the D.C. Circuit have explicitly adopted the percentage method for computing attorney fees in common fund cases. *See* Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 853 (10th Cir. 1993); Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768, 775 (11th Cir. 1991); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993).

The United States Court of Appeals for the Third Circuit appointed a Task Force on Court Awarded Attorney Fees whose report is published at 108 F.R.D. 237 (1985). After noting a number of concerns, the Task Force observed:

> Accordingly the Task Force recommends that in the traditional common-fund situation and in those statutory fee cases that are likely to result in a settlement fund from which adequate counsel fees can be paid, the district court, on its own motion or its own initiative and at the earliest practical moment, should attempt to establish a percentage fee arrangement agreeable to the Bench and to Plaintiff's counsel . . . .

Id. at 255-56.

Other circuit courts leave the choice between methods to the trial court. State court decisions also reflect that courts are accorded broad discretion with respect to the standard used to measure reasonableness in common fund cases. Both state and federal judicial opinions, especially in class action suits, reflect a preference for the percentage of the fund measure. For an in-depth and detailed discussion of the standards, see Edelman & Combs v. Law, 663 So. 2d 957 (Ala. 1995); Goodrich v. E.F. Hutton Group, Inc., 681 A.2d 1039 (Del. 1996); *Montalvo*, 641 P.2d at 1321; Brundidge v. Glendale Fed. Bank, 659 N.E.2d 909 (Ill. 1995); Citizens Actions Coalition of Indiana, Inc. v. PSI Energy, Inc., 664 N.E.2d 401 (Ind. Ct. App. 1996); Crouch v. Tenneco, Inc., 853 S.W.2d 643 (Tex. App. 1993); Bowles v. Washington Dep't of Retirement Sys., 847 P.2d 440 (Wash. 1993); Wisconsin Retired Teachers Ass'n v. Employee Trust Funds Bd., 558 N.W.2d 83 (Wis. 1997).

56. Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); *see also* Boeing Co. v. Van Gamert, 444 U.S. 472 (1980); B.P. North Am. Trading, Inc. v. Vessel Panamax Nova, 784 F.2d 975 (9th Cir. 1986); Municipality of Anchorage v. Gentile, 922 P.2d 248 (Alaska

fund.[57]

An insurance company may request the court to reduce the amount of fees it owes by demonstrating that they are unreasonable. This right to claim a reduction arises out of the fact that the insurer is not contractually bound by the fee agreement between insured and its counsel.[58] The amount of the fee owed by the insurer should be apportioned according to the dictates of equity.[59] Consequently, if the insurer can show that the fees assessed are excessive and inequitable, the court may reduce them accordingly.[60] Whether the attorney's fee arrangement with the insured is consistent with customary fee arrangement in the profession is a relevant consideration in determining reasonableness.[61]

III. EXISTENCE OF SUBROGATION

The right to subrogation in the defendant and its protection by plaintiff's counsel are essential to a claim for attorney fees under the common fund doctrine.[62] Subrogation has been variably defined as:

> the substitution of one person in the place of another, whether as a creditor or as the possessor of any rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and to its rights, remedies, or securities.[63]

The right to subrogation is founded, not necessarily upon contract but upon justice and equity, and is based upon the principle that substantial justice should

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1996); Kuhn v. State, 924 P.2d 1053 (Colo. 1996); *Goodrich*, 681 A.2d at 1039; *Wisconsin Retired Teachers Ass'n*, 558 N.W.2d at 83.

57. *See* Hatcher v. United States Nat'l Bank, 643 P.2d 359 (Or. Ct. App. 1982); Miller v. Myers, 150 A. 588 (Pa. 1930); Seattle Trust & Sav. Bank v. McCarthy, 617 P.2d 1023 (Wash. 1980). *Cf.* Montgomery v. Hoskins, 432 S.W.2d 654 (Tenn. 1968) (the fund being exhausted the award should be taxed to the beneficiaries).

58. *Amica Mut. Ins. Co.*, 903 P.2d at 834. *See supra* note 54.

59. *See supra* note 58.

60. *See supra* note 58.

61. *See supra* note 58.

62. As a general rule, the subrogee steps into the shoes of the subrogor; consequently, if the plaintiff has done anything to destroy the insurer's right to seek subrogation plaintiff's counsel is not entitled to an award of fees because the required fund never came into existence. Likewise, if plaintiff's counsel has taken an adversarial position with regards to the insurer's right to subrogation fees may not be recovered. *See infra* Part IV.

63. Indiana Lumbermen's Mut. Ins. Co. v. Curtis Mathes Manuf. Co., 456 So. 2d 750, 754 (Miss. 1984).

In the specific context of insurance law, subrogation has been defined as "the right of the insurer to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss paid by the insurer." GEORGE JAMES COUCH, COUCH ON INSURANCE § 61:1 (2d ed. 1983).

be attained regardless of form.[64] It is a creature of equity and is the method equity has chosen to compel the payment of a debt by one who, in fairness and good conscience, ought to pay.[65] The right to subrogation ordinarily arises when the insurer has paid to an insured the proceeds of the policy.[66] The insurer however, as a general rule, may not exercise the right, even though it exists, until the insured has been made whole.[67]

When an insurer pays the claim of its insured, it is "subrogated by operation of the law to recovery of its payments against the person who caused the loss."[68] The right of subrogation allows an insurer who has compensated his insured to step into the shoes of the insured and collect what it has been paid from the

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64. There are two forms of subrogation, legal—which arises by operation of the law—and conventional—which arises by convention or the contract between the parties. This distinction between legal and conventional subrogation is rarely significant because the same facts which give rise to legal subrogation will also support a conventional subrogation claim. *Id.* § 61:2.

Conventional subrogation provisions are, however, significantly different from subrogation rights that arise by operation of the law in that they may provide the insurer with greater rights than it would have by operation of law. The contract provisions control and are enforceable unless they contravene public policy. *Id.*

65. Couch states the following:

> Subrogation has the dual objective of (1) preventing the insured from recovering twice for the one harm, as would be the case if he could recover from both the insurer and from a third person who caused the harm, and (2) reimbursing the surety for the payment which it has made.

Id. § 61:18.

66. *See id.* § 61:4. Payment by insurer is a condition precedent to the right of subrogation. The insurer is only subrogated to the extent of the payment made to insured. *Id.* §§ 61:39, 61:49 & 61:51. The right to subrogation usually arises out of payments made to the insured. However, the right can also arise out of any act that discharges the insurer's obligation to the insured such as replacement, repair or reconstruction of the damaged property. *Id.* § 61:52.

67. Subrogation is basically an equitable doctrine and is normally accorded upon the principles of justice and fairness. Consequently, even where the right to subrogation is declared contractually, equity may intervene and require that the insured be made whole before the insurer's right to subrogation arises. *Id.* § 61.20; *see also* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 3.10(1), at 219-20 (student ed. 1988); 46A C.J.S. *Insurance* § 1466, at 361 (1993). *Cf.* Equity Fire & Cas. Co. v. Youngblood, 927 P.2d 572 (Okla. 1996) (Make whole rule is the majority view. ERISA Plans provision may, under certain circumstances, circumvent the application of the common law make whole rule).

"Made" whole is generally computed by determining whether total recovery exceeds total loss. If total recovery exceeds total loss then the insurer may seek subrogation. *See* CNA Ins. Cos. v. Johnson Galleries, 639 So. 2d 1355 (Ala. 1994).

68. Generally, in the absence of a clear and unambiguous provision, an insurance company may not seek to enforce its right to subrogation against its insured. 46A C.J.S. *Insurance* §§ 1465-1466 (1993). However, if insured recovers from the tortfeasor and has received the proceeds of the policy he must account therefor to the company. *Id.* § 1470.

wrongdoer.[69] When the amount paid by the insurer under the insurance policy does not cover the insured's total loss, leaving an excess loss to be paid by the tortfeasor, the insured retains the right of action for the entire loss.[70] Consequently, in the action against the tortfeasor, the claim in essence belongs to the insured and the insurer is deemed to be merely an indispensable party. As such, the role of the insurer in the litigation is quite limited.[71] However, because subrogation "is founded upon the relationship of the parties and upon equitable principles, for the purpose of accomplishing the ends of justice,"[72] the insured is obligated to protect the insurer's subrogation interest when pursuing its claim against the tortfeasor.[73] Thus, when the insured pursues its claim against the tortfeasor,

> the insured becomes a trustee and holds the amount of recovery, equal to the indemnity for the use and benefit of the insurer. [This] rule is founded on the principle that the wrongful act was single and indivisible, and gives rise to but one liability. Upon this theory the splitting of cause of action is avoided and the wrongdoer is not subjected to a multiplicity of suits.[74]

In insurance subrogation cases, where both the insurer and insured have claims against the tortfeasors, there is but one cause of action for the entire

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69. Some jurisdictions recognize the right of the insurance company to bring an independent action to recover directly from the tortfeasor. Where the insurance company has paid the insured's entire loss it is the real party in interest and must sue in its own name. *Id.* §§ 1490-1492.

70. *Id.* §§ 1491-1492.

71. *See, e.g.*, Safeco Ins. Co. v. United States Fidelity & Guaranty Co., 679 P.2d 816, 818 (N.M. 1984) (insurer's presence as party should not be revealed to the jury, but that after judgment insurer can come forward and present evidence proving its subrogated interest); Landrum v. National Union Ins. Co., 912 P.2d 324 (Okla. 1996) (even where insurer has right to intervene court may take any appropriate steps to prevent intervenor from prejudicing the trial of the action).

72. JOHN ALAN APPLEMAN, 6A INSURANCE LAW AND PRACTICE § 4054, at 142-44 (1995).

73. 46A C.J.S. *Insurance* §§ 1491-1493 (1993). The right to subrogation, where provided in the policy, may allow an insurance company which has paid its insured for a loss to recover payments made to the insured by the party responsible for that loss to the extent of the payment made. *Id.* § 1470.

74. Bowen v. American Family Ins. Group, 504 N.W.2d 604, 605 (S.D. 1993); *see also* North River Ins. Co. v. McKenzie, 74 So. 2d 599 (Ala. 1954); Erwin, Inc. v. Arkansas Louisiana Gas Co., 550 S.W.2d 174 (Ark. 1977); Krause v. State Farm Mut. Auto. Ins. Co., 169 N.W.2d 601 (Neb. 1969); Amica Mut. Ins. Co. v. Maloney, 903 P.2d 834 (N.M. 1995); Farmers Ins. Exch. v. Arlt, 61 N.W.2d 429 (N.D. 1953); Muskogee Title Co. v. First Nat'l Bank & Trust Co., 894 P.2d 1148 (Okla. Ct. App. 1995).

"Although the judicial decisions are in conflict, a majority hold that a splitting of a tort cause of action is not allowed. Furthermore, at least some of the decisions that appear to approve splitting the action actually can be explained on a rationale that is consistent with the majority rule." KEETON & WIDISS, *supra* note 67, § 3.10(2), at 242-43.

recovery, and that action lies in the name of the insured.[75] The insurer, however, is entitled to: (1) join with the insured and participate in settlement negotiations for the entire settlement amount; and, (2) intervene in any legal action.[76] Where the insurer chooses not to exercise either of these rights it is deemed to be relying upon the efforts of the insured to protect its subrogation interest.[77]

Producers of insurance products, in lieu of subrogation provisions in the policy, have circumvented the fund doctrine by contractually articulating the basis of the right to recover from third parties in terms of assignments, loans or reimbursement provisions. For example, in *Mathews v. Bankers Life & Casualty Co.*,[78] plaintiff's attorney sought recovery of fees from client's insurer for having reached a successful settlement of the plaintiff's claim with a third party tortfeasor. The policy provided that insurer would pay charges incurred by insured if: "[t]he family member (or if incapable, his or her legal representative) agrees in writing to pay us back *out of any third party payments*, for charges we've paid."[79] Under this provision, Bankers Life advanced its insured James Godwin $114,776.50 for medical expenses incurred as a result of an automobile accident with a third-party tortfeasor.

The policy in issue was drafted for the purpose of avoiding application of the common fund doctrine.[80] Consequently, the court formulated the dispositive issue as:

> whether an insurance policy which expressly grants insurer a right to be reimbursed out of any fund which insured recovers from third parties but does not expressly grant a right to subrogate to the insured's claim against third parties avoids application of "the common fund" doctrine even though the insurer is entitled to reimbursement out of the insured's recovery.[81]

Though an issue of first impression, the court analyzed the issue from the perspective of equity and recognized that the right to reimbursement out of the fund recovered from the third-party tortfeasor, rather than the right to be subrogated to the claim, triggers application of the common fund doctrine.[82]

The influence of equity on the analysis in *Mathews* is reflected in the manner

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75. 46A C.J.S. *Insurance* §§ 1491-1493 (1993); *see also Krause*, 169 N.W.2d at 601; Furia v. City of Philadelphia, 118 A.2d 236 (Pa. Super. Ct. 1955); Tennessee Farmers Mut. Ins. Co. v. Pritchett, 391 S.W.2d 671 (Tenn. Ct. App. 1964).

76. 46A C.J.S. *Insurance* §§ 1491-1493 (1993).

77. *See supra* note 75; *see also* State Farm Mut. Auto. Ins. Co. v. Elkins, 451 S.W.2d 528 (Tex. App. 1970); Metropolitan Life Ins. Co. v. Ritz, 422 P.2d 780 (Wash. 1967); Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382 (1872).

78. 690 F. Supp. 984 (M.D. Ala. 1988).

79. *Id.* at 985 (emphasis in original).

80. *Id.* at 986.

81. *Id.*

82. *Id.* at 987; *see also* Lee v. State Farm Mut. Ins. Co., 129 Cal. Rptr. 271 (Cal. Ct. App. 1976).

in which the court dealt with the judicial observation that:

> [a]pplication of the "common fund" doctrine to the facts of this case is not particularly compelling since plaintiffs have recovered already a large attorney fee and the Godwins [clients] have obtained a recovery substantially in excess of five million dollars.[83]

Though client and attorney, in the principal case, had been substantially compensated the court recognized the unfair impact that a contrary rule might have where the client's recovery was less than, equal to, or slightly more than the amount owed the insurer.[84] Under any of these circumstances the client would receive little if anything and still owe an attorney fee, while the insurer received full reimbursement at no cost. Such a result, the court concluded, would be "manifestly unjust."[85] As a whole, the decision in *Mathews* demonstrates equity's regard for substance over form.[86]

IV. COMMON FUND APPLICATION TO INSURANCE SUBROGATION

The common fund doctrine was first conceptualized in the context of insurance subrogation law in the case of *Newcomb v. Cincinnati Insurance Co.*[87] Therein, the court in ascertaining the extent of an insurance company's subrogation right against proceeds in the hands of its insured observed that:

> [w]here the assured, as in case of partial insurance, sustains a loss, in excess of the reimbursement or compensation by the underwriter, he has an undoubted right to have it satisfied by action against the wrong-doer. But if, by such action, there comes into his hands, any sum for which, in equity and good conscience, he ought to account to the underwriter, reimbursement will, to that extent, be compelled in an action by the

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83. *Mathews*, 690 F. Supp. at 987.

84. *Id.*

85. *Id.*

86. Wilkie v. Philadelphia Life Ins. Co., 197 S.E. 375, 378 (S.C. 1938). Substance not form is controlling; consequently, a document labeled "loan receipt," "assignment," or "reimbursement agreement," which is in substance a right to subrogation parading in disguise will be treated as a right to subrogation. State Farm Mut. Auto. Ins. Co. v. Geline, 179 N.W.2d 815, 819 (Wis. 1970).

Though similar in effect, a significant distinction exists between the legal rules applicable to a subrogation provision and a reimbursement provision. The right to subrogation substitutes the insurer in the place of the insured and entitles the former to assert the action and rights of the latter. Reimbursement, on the other hand, entitles the insured to repayment of the amount paid by the insured. In determining whether a provision is one of subrogation or reimbursement the language used and the rights granted must be examined. Where the language gives the insurer the right to assert the action and rights of the insured against the tortfeasor, the provision is treated as one of subrogation. "A true reimbursement provision does not allow the insurer to proceed against the tortfeasor." Barreca v. Cobb, 668 So. 2d 1129, 1131 (La. 1996); *see also* Metropolitan Life Ins. Co. v. Ritz, 422 P.2d 780 (Wash. 1967).

87. 22 Ohio St. 382 (1872).

> latter, based on his right in equity to subrogation. But the assured will not, in the forum of conscience, be required to account for more than the surplus, which may remain in his hands, after satisfying his own excess of loss in full, and his reasonable expenses incurred in its recovery; unless the underwriter shall, on notice and opportunity given, have contributed to, and made common cause with him, in the prosecution.[88]

This articulation of the doctrine merely accorded an insured, in a partial insurance case, the right to calculate the costs and expenses of recovering from the third party in the equation for determining whether he had been fully compensated for his loss.[89] The common fund doctrine, as we now know it however, was first articulated by the Nebraska Supreme Court in *United States Automobile Assn. v. Hills*.[90] In *Hills*, the court observed that:

> the applicable rule is that where the holder of the subrogation right does not come into the action, whether he refuses to do so or acquiesces in the plaintiff's action, but accepts the avails of the litigation, he should be subjected to his proportionate share of the expenses thereof, including attorney's fees.[91]

As in other types of cases to which the fund doctrine has been applied, an attorney seeking compensation from the proceeds represented by the recovered subrogation fund must have assumed the risk and expenses of litigation to the exclusion of the insurance company and successfully contributed to the existence or protection of the subrogation proceeds in which his client and the insurance company have a mutual interest.[92] However, the doctrine has a number of requirements peculiar to the insurance subrogation context.

For example, early application of the fund doctrine in subrogation cases required that the attorney provide the holder of a subrogated interest with timely notice that a claim has or will be asserted and that unless the holder elects to join in the action as a party thereto, a reasonable fee for services rendered in accomplishing collection of the subrogated interest will be charged.[93] This

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88. *Id.* at 388.

89. Camden Fire Ins. Ass'n v. Missouri, Kan. & Tex. Ry. Co., 175 S.W. 816, 821 (Tex. App. 1915) (citing *Newcomb*, 22 Ohio St. at 388). The modern rule is that attorney fees may not be computed in determining whether there is an excess available for subrogation. Thus, attorney fees may not be considered in computing an insured's total loss. *See, e.g.*, CNA Ins. Cos. v. Johnson Galleries, 639 So. 2d 1355 (Ala. 1994); *see also supra* note 10.

90. 109 N.W.2d 174 (Neb. 1961).

91. *Id.* at 177.

92. The attorney's client, as well as the passive beneficiaries, must have a mutual interest in the fund in order to apply the fund doctrine. *See* Mathews v. Bankers Life & Cas. Co., 690 F. Supp. 984, 987 (M.D. Ala. 1988); *In re* Cash Currency Exch., Inc. v. Shamrock Hill Farm, Inc., 80 B.R. 113, 115 (Bankr. N.D. Ill. 1987); B.P. North Am. Trading, Inc. v. Vessel Panamax Nova, 784 F.2d 975, 977 (9th Cir. 1986).

93. STUART M. SPEISER, ATTORNEYS' FEES § 10:3, at 378 (1973); *see also Newcomb*, 22

requirement was extracted from the judicial articulation of the doctrine in *Newcomb*. The objective of the notice requirement, also expressed in *Newcomb*, is to provide the insurance company an opportunity to join the action and to be represented by counsel of its own choosing.[94]

The notice requirement, as described above, never received widespread judicial acceptance. This fact is due, in large part, to the insurance industry's development and adoption of sophisticated and complex contracts of adhesions which contained comprehensive subrogation provisions designed for the sole purpose of strengthening the company's position and protecting its right to subrogation. The standard form contract not only defined the extent of the company's rights, but also obligated the insured to notify, protect and cooperate with the company in the enforcement of its rights. Consequently, when common fund application to insurance began to gain widespread acceptance, the notice requirement was relaxed.[95] This relaxation was effectuated by placing the burden on the insurance company, if it wished to be informed of the insured's intention to assert a claim against the tortfeasor, to insert such a provision in the subrogation agreement.[96]

Obligating insurance companies to require notice in the contract of insurance is not unduly burdensome. This requirement merely corresponds with the practice already engaged in by a substantial segment of the industry.[97] Insurers, simultaneously with payment of the proceeds under the policy, as a matter of course apprise the insured of the terms and conditions of the payment. Thereafter the insured, obligated by the terms of the policy and rules of equity, stands in a position of trust to the extent of the payment made.[98] Insurers also customarily notify the third-party tortfeasor of his or her right to indemnification.

Ohio St. at 382; Commercial Standard Ins. Co. v. Combs, 460 S.W.2d 770 (Ark. 1970); State Farm Mut. Auto. Ins. Co. v. Geline, 179 N.W.2d 815 (Wis. 1970).

94. *See supra* note 93.

95. *See, e.g.*, Alfa Mut. Ins. Co. v. Head, 655 So. 2d 975 (Ala. 1995) (request for fees made during course of litigation); County Workers Compensation Pool v. Davis, 817 P.2d 521 (Colo. 1991) (request for fees made during course of litigation); Tennessee Farmers Mut. Ins. Co. v. Pritchett, 391 S.W.2d 671 (Tenn. Ct. App. 1964).

96. *See* Washington Fire & Marine Ins. Co. v. Hammett, 377 S.W.2d 811, 812 (Ark. 1964); *Davis*, 817 P.2d at 526 n.5; *see also* Barreca v. Cobb, 668 So. 2d 1129 (La. 1996). In *Barreca*, the court stated that:

> [I]n subrogation cases, an important prerequisite to the assessment of attorney fees is timely notice to the insurer. Timely notice is necessary to allow the insurer to exercise its right to join the action, or bring its own action, and be represented by legal counsel of its own choosing if it so elects.

Id. at 1132.

97. As observed in the text, the objectives of the notice requirement were to give the insurer an opportunity to join the action as a party and to choose an attorney of its choice. These objectives are not compromised by placing the notice requirement in the law of subrogation. *See supra* notes 95 & 96.

98. *See* 46A C.J.S. *Insurance* §§ 1469-1470 (1993).

Notice to the tortfeasor, prior to settlement with the insured, binds the tortfeasor to the right, claims and interest of the insurer.[99] Consequently, the third-party tortfeasor can not escape his or her obligation to indemnify the insurer by subsequently settling with the insured.[100]

Though notice of an intent to file a claim against the tortfeasor is not a literal requirement for common fund application in a majority of jurisdictions, notice from the insured's attorney to the insurance company can serve another purpose unique to fund doctrine application. As a matter of practice, notification is often used by the attorney to express his willingness to represent and protect the subrogated interest of the insurer. Notice in this context, even if the offer of representation is rejected, evidences the fact that the attorney recognizes, appreciates and intends to protect the interest of the insurance company along with that of his client. Thus, the insurer is aware that the attorney expects to be compensated. Notice of a willingness to represent also negates the existence of an adversarial relationship which operates as a defense to common fund application.[101]

An insurance company's rejection of insured's attorney's offer to represent the insured alone does not necessarily preclude application of the fund doctrine.[102] This rule, though not absolute, has been applied with some consistency where the insurer rejects an offer, directs insured's attorney to take no action to protect its interest, and thereafter fails to take any action to protect its own interest.[103] The decisional law explains this result as a consequence of the rule against splitting causes of actions.[104] However, the better explanation is that equity does not favor the position of one who sits idly by and allows another, who obviously expects to be paid, to perform valuable services for him, to escape

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99. *See id.* § 1472.

100. *Id.*

101. *See* CNA Ins. Cos. v. Johnson Galleries, 639 So. 2d 1355, 1359 (Ala. 1994); Commercial Union Ins. Co. v. Scott, 158 S.E.2d 295, 297 (Ga. Ct. App. 1967).

The requirement that the relationship between the client and the passive beneficiaries of the fund not be adversarial is based on the general proposition that the same attorney may not represent adverse parties in the same action. Consequently, the relationship is not adversarial unless the subrogor is denying that subrogee has a subrogated interest in the proceeds. Conflicts, such as disputes over the right to intervene, distribution of the funds or as between the subrogee and the attorney as to the attorney's right to, or amount of a fee, do not involve the type of adverse relationship which would preclude application of the common fund doctrine. *See* Lyons v. GEICO Ins. Co., 689 So. 2d 182, 184 (Ala. Civ. App. 1997); Baier v. State Farm Ins. Co., 361 N.E.2d 1100, 1102-03 (Ill. 1977).

102. *See, e.g.*, Forsyth v. Southern Bell Tel. & Tel. Co., 162 So. 2d 916 (Fla. Dist. Ct. App. 1964); United Servs. Auto. Ass'n v. Hills, 109 N.W.2d 174 (Neb. 1961).

103. *See, e.g.*, Commercial Standard Ins. Co. v. Combs, 460 S.W.2d 770 (Ark. 1971); *Forsyth*, 162 So. 2d at 916; *Hills*, 109 N.W.2d at 174; Lancer Corp. v. Murillo, 909 S.W.2d 122 (Tex. App. 1995).

104. *Hills*, 109 N.W.2d at 174; Travelers Ins. Co. v. Williams, 541 S.W.2d 587, 589 (Tenn. 1976).

with the value of those services without compensating for same.[105]

Application of the foregoing rule has by no means been universal. For example, in *Travelers Insurance Co. v. Williams*,[106] the insurance company wrote the insured's attorney and advised him not to protect its subrogation right and that it would protect its own interest.[107] Thereafter, it communicated its right to be indemnified to the tortfeasor's liability carrier. Months later, a settlement was executed and the insured sought to have Travelers, which had done nothing in addition to notifying the parties of its interest, pay a pro rata share of the costs and attorneys fees expended in achieving the settlement. The court, after discussing the merits and objectives of the fund doctrine, noted that:

> This device, known as the "fund doctrine," was invented by courts of equity to prevent passive beneficiaries of the fund from being unjustly enriched. It is therefore, never applied against persons who employed counsel on their own account to represent their interests. Thus, the right to employ counsel of one's own choosing is preserved.[108]

Justice Brock, writing for the court in *Travelers*, observed that the issue of whether the attorney was entitled to a fee depended upon the existence of an express, implied or quasi contractual relationship between the attorney and insurance company.[109] Relying upon this analysis, Justice Brock concluded that no such relationship existed in light of the insurer's rejection of the attorney's services. This conclusion, according to Justice Brock, was also supported by the absence of any unjust enrichment on the part of the company.[110]

The holding and dictum of *Travelers* do not accurately reflect or characterize the state of the law in the majority of jurisdictions. The common fund doctrine, contrary to the court's opinion, has been consistently applied against insurance companies which have retained counsel and even intervened in the litigation.[111]

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105. *See, e.g.*, Tennessee Farmers Mut. Ins. Co. v. Pritchett, 391 S.W.2d 671 (Tenn. Ct. App. 1964). Therein, the court observed that the case was "another glaring example of an insurance company sitting back on its haunches, doing nothing and waiting to get its share of a claim procured by attorneys, but not wanting to pay its share of an attorney's fee." *Id.* at 674.

106. 541 S.W.2d 587 (Tenn. 1976); *see also* Wyoming Farm Bureau Mut. Ins. Co. v. Mondale, 502 P.2d 39 (Mont. 1972) (court reached same result without referring to common fund doctrine). The holdings and dicta in decisional law from other jurisdictions seemingly support the view espoused by the court in the *Travelers* opinion. In these cases, however, the refusal to apply the fund doctrine was not premised solely upon the rejection of the offer of representation as in *Travelers*, but rather upon the fact that the insurer actively participated in the recovery. *See, e.g.*, Abston v. Aetna Cas. & Sur. Co., 346 N.W.2d 63 (Mich. Ct. App. 1983); Oakley v. Fireman's Fund, 470 N.W.2d 882 (Wis. 1991).

107. *Travelers Ins. Co.*, 541 S.W.2d at 590.

108. *Id.* at 590 (citations omitted).

109. *Id.*

110. *Id.*

111. *See, e.g.*, Alston v. State Farm Mut. Auto. Ins. Co., 660 So. 2d 1314 (Ala. Civ. App. 1995); Castellari v. Partners Health Plan, 860 P.2d 593 (Colo. Ct. App. 1993); Amica Mut. Ins. Co.

Furthermore, the fund doctrine in conjunction with the facts of the *Travelers* case, provides the required implied or quasi contractual relationship that serves as the foundation for the award of fees. Thus, where the insurance company rejects the offer of representation, sits by and subsequently seeks to recover in full from the insured, equity recognizes not only the existence of an implied or quasi contractual relationship, but also unjust enrichment on the part of the company. This view is in keeping with the basic premise of the fund doctrine which is to prevent *passive beneficiaries* from being unjustly enriched by requiring them to bear a share of the cost of the litigation.[112]

An insurance company's rejection of representation is not the sole determinative factor in determining common fund application.[113] Were the case otherwise, the insurance industry could immunize itself from the consequences of the doctrine by merely unambiguously disclaiming the services of attorneys, other than one chosen by the company. Unambiguous policy provisions which provide that the insured may not deduct expenses incurred in the recovery of funds payable to the insurance company are valid.[114] However, no recorded opinion has withstood the ambiguity analysis.[115]

A company's rejection of an offer of representation from the insured's attorney is better considered along with the other actions of the company. For example, where the company declines the offer of representation and informs the attorney that it will pursue an alternative avenue to protect its interest and does

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v. Maloney, 903 P.2d 834 (N.M. 1995); Lancer Corp. v. Murillo, 909 S.W.2d 122 (Tex. App. 1995).

112. *See supra* note 39 and accompanying text.

113. *See* Dunn v. State Farm Ins., Co., 426 N.E.2d 315 (Ill. 1981).

114. *See* Wiswell v. Shelby Mut. Ins. Co., 515 N.E.2d 1214 (Ohio Ct. App. 1986).

115. Courts universally agree that insurance contracts are to be construed as any other contract. The principle of freedom of contract, except where it has been declared to contravene public policy, is applicable to every aspect of the insurance policy. The exercise of the right to freely contract in the context of insurance has, at time, fallen victim to judicial scrutiny. For example, it is uniformly agreed that in the absence of ambiguity the provisions of the insurance contract control. This observation has been made in the context of both the principle of subrogation and the common fund doctrine. However, courts have short circuited application of this rule by applying either the doctrine of ambiguity, the reasonable expectations of the insured, or the maxim of unconscionability. The dynamic of looking beyond the principle of freedom of contract merely reflects that judicial discretion to respond to equity cannot be bargained away. Thus, the principle of equity is subject to judicial review even where the parties have otherwise entered into an agreement. Equity is the exclusive domain of the judiciary. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Clinton, 518 P.2d 645 (Or. 1974); Higginbotham v. Arkansas Blue Cross & Blue Shield, 849 S.W.2d 464 (Ark. 1993), *rev'g* Franklin v. Healthsource of Arkansas, 942 S.W.2d 837 (Ark. 1997) (allowing the literal language of the contract to control ignores insured's equitable right to subrogation). *Cf. Wiswell*, 515 N.E.2d at 1214 (court upheld policy provision).

For a detailed discussion of the most influential principles and doctrines employed by courts to justify looking beyond the insurance contract, see KEETON & WIDISS, *supra* note 67, §§ 6.1-6.3, at 614-45.

in fact pursue the alternative avenue, then the doctrine is certainly inapplicable.[116] Preclusion of the doctrine however, arises not out of the company's rejection of the offer of representation, but rather out of the fact that it was not a passive but active contributor to the fund.[117] This approach to the problem has lead to the development of the uniformly accepted— active beneficiary and incidental benefit—defenses to common fund application. The common fund doctrine is not an absolute rule. It is limited to the preservation or creation of a fund and does not allow for the recovery of fees incurred in attempting to recover the initial fees.[118] There are two defenses which an insurer can assert to avoid having to pay a share of the insured's attorneys fees and costs. The first is the active participation defense. This defense requires that the insurer prove that it actively participated in or its efforts substantially contributed to the creation or preservation of the subrogated fund.[119] The extent to which an insurer must actively participate or contribute to the recovery to avoid application of the fund doctrine varies from jurisdiction to jurisdiction. Some jurisdictions require very little participation and have rejected application of the doctrine when the insurer rejects the offer of representation from insured's attorney, hires its own counsel and intervenes in the litigation or pursues an alternate theory of recovery.[120] The focus of the examination in these jurisdictions is on whether the insurer was a passive beneficiary in the literal sense of the term.

Other jurisdictions require substantially more participation or contribution and define the defense accordingly:

> [I]n order for the insurer to claim active participation in a settlement, it must demonstrate that it participated in the settlement negotiations with the insured for the *entire* settlement and substantially contributed to that *total* settlement award. Similarly, to show active participation in a judgment against the tortfeasor, the insurer must show that it intervened in the suit and participated in the case. . . or at the very least demonstrate that it significantly contributed to discovery.[121]

Whether the insurer has substantially participated or contributed under this definition turns upon whether it performed services in aid of the recovery of the fund.[122] It is the value of the services expended by insurer in the creation of the

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116. *See* Washington Fire & Marine Ins. Co. v. Hammett, 377 S.W.2d 811 (Ark. 1964); Osborne v. State Farm Mut. Auto. Ins. Co., 923 P.2d 304 (Colo. Ct. App. 1996); *Dunn*, 426 N.E.2d at 318; Abston v. Aetna Cas. & Sur. Co., 346 N.W.2d 63 (Mich. Ct. App. 1983); Oakley v. Fireman's Fund, 470 N.W.2d 882, 887 (Wis. 1991).

117. *See supra* note 116.

118. *See, e.g.*, Amica Mut. Ins. Co. v. Maloney, 903 P.2d 834 (N.M. 1995).

119. *See* County Workers Compensation Pool v. Davis, 817 P.2d 521 (Colo. 1991); *Maloney*, 903 P.2d at 834; Lancer Corp. v. Murillo, 909 S.W.2d 122 (Tex. App. 1995).

120. *See Dunn*, 426 N.E.2d at 318; *Abston*, 346 N.W.2d at 66; *Oakley*, 470 N.W.2d at 883.

121. *Maloney*, 903 P.2d at 840 (emphasis added).

122. *See, e.g.*, Alston v. State Farm Mut. Auto. Ins. Co., 660 So. 2d 1314 (Ala. Civ. App. 1995); Blue Cross & Blue Shield v. Freeman, 447 So. 2d 757 (Ala. Civ. App. 1983); Kavanaugh

fund which is the decisive factor.[123]

The second defense to common fund application is the incidental benefit rule. This defense is ordinarily recognized in cases where the insurer has attempted to actively protect its interest without involving itself in the insured's efforts. For example, in *Dunn, Brady, Goebel, Ulbrich, Morel, Kombrink & Hundman v. State Farm Insurance Co.*[124] The insurer rejected the insured's attorney's offer of representation and informed said attorney that it would pursue its claim directly with the tortfeasor's liability carrier. Thereafter, insurer's efforts led to an agreement with the tortfeasor's carrier whereby its subrogation claim would be paid in installments. Months later, both insurer and insured, on the same day, signed release agreements with the liability carrier. The attorney for insured thereafter sought fees from insurer. The court expressly noted that "the facts graphically demonstrate that defendant [insurer] expended direct and substantial time and energy in pursuing its subrogation claims directly with Commercial."[125] Consequently, any benefit that insurer received from the insured's litigation was purely incidental.[126] The same conclusion was reached in *Osborne v. State Farm Mutual Automobile Insurance Co.*[127] which involved very similar facts.

The incidental benefit defense is also applicable to instances in which the insured's attorney asserts a position adverse to the insurer's subrogation interest.[128] Thus, in *CNA Insurance Co. v. Johnson Galleries*,[129] the court, as a result of the insured's attorney's legal position, observed that

> if the attorney is simply acting on behalf of his client, and a benefit only incidentally comes to others, the attorney is not entitled to a fee from those receiving the incidental benefit. In this regard, a benefit can be incidental, rather than an intended, result of an attorney's efforts, if the relationship between the attorney and the "nonclient" person receiving the benefit is an adversarial one.[130]

An adversarial position by the insured's attorney is not a defense if it does not go toward the creation of the fund.[131] Thus, conflicts over whether the insurer

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v. City of Sunnyvale, 284 Cal. Rptr. 698 (Cal. Ct. App. 1991); Castellari v. Partners Health Plan, 860 P.2d 593 (Colo. Ct. App. 1993); *Lancer Corp.*, 909 S.W.2d at 125.

123. Merely intervening in the litigation or notifying the parties of the subrogation interest does not assist or aid in the creation of the fund in these jurisdictions. *See supra* note 121.

124. *Dunn*, 426 N.E.2d at 317.

125. *Id.* at 318.

126. *Id.*

127. 923 P.2d 304 (Colo. Ct. App. 1996).

128. *See, e.g.*, CNA Ins. Cos. v. Johnson Galleries, 639 So. 2d 1355 (Ala. 1994); Baier v. State Farm Ins. Co., 361 N.E.2d 1100 (Ill. 1977); Peppertree Resorts, Ltd. v. Cabana Ltd., 431 S.E.2d 598 (S.C. App. 1993).

129. *CNA Ins. Cos.*, 639 So. 2d at 1355.

130. *Id.* at 1359 (citations omitted).

131. *Baier*, 361 N.E.2d at 1103.

should be allowed to intervene, how much subrogee is entitled to or between the attorney and subrogee as to the amount of the fees, do not involve the adverse relationship with which the defense is concerned.[132]

The distinction between the substantial participation/contribution and incidental benefit defenses is at times obscure. However, the former is primarily concerned with the value of the insurer's services in the context of either the insured's settlement efforts or litigation. The latter is primarily concerned with the value of the attorney's services when compared to the means employed by the insurer, other than joining in insured litigation or settlement efforts, to protect its own interest. The focus of both defenses is on the value of the services to the creation of the fund. It is only in those instances where the value of the insurer's services is so substantially disproportionate to that of the insured's attorney that they constituted an insignificant contribution toward the creation of the fund that either defense is applicable.

One other peculiarity of the common fund doctrine in the context of insurance subrogation law is the practice of requesting the tortfeasor's liability carrier to submit payment in the form of multiple drafts—one to the order of attorney and client and the other to the order of the attorney and insurer.[133] This practice did not evolve out of any legal requirement. Rather it was developed as a means of avoiding inconvenience to the insured, the client of both the attorney and subrogee. This practice not only prevents inconvenience but also does not jeopardize the legal position of any of the parties, including the liability carrier.

CONCLUSION

The paths along which the common fund doctrine has developed have been clear and well defined. All states, except New Hampshire and Wyoming, have adopted the common fund doctrine. Jurisdictions which have adopted the doctrine have uniformly applied it to trust and class action cases. However, only 20 states have expressly recognized that the doctrine is applicable to insurance subrogation cases.[134] The remaining jurisdictions have either not addressed this

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132. *Id.*; *see also* Alfa Mut. Ins. Co. v. Head, 655 So. 2d 975 (Ala. 1995).

133. *See, e.g.*, Commercial Standard Ins. Co. v. Combs, 460 S.W.2d 770 (Ark. 1970); United Servs. Auto. Ass'n v. Hills, 109 N.W.2d 174 (Neb. 1961); State Farm Mut. Auto. Ins. Co. v. Clinton, 518 P.2d 645 (Or. 1974).

134. *See* Blue Cross & Blue Shield v. Freeman, 447 So. 2d 757, 759 (Ala. Civ. App. 1983); Washington Fire & Marine Ins. Co. v. Hammett, 377 S.W.2d 811, 813 (Ark. 1964); Lee v. State Farm Mut. Auto. Ins. Co., 129 Cal. Rptr. 271 (Cal. Ct. App. 1976); County Workers Compensation Pool v. Davis, 817 P.2d 521, 526 (Colo. 1991); Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162 (Del. 1989) (no limitations on the type of cases to which doctrine applies); Forsyth v. Southern Bell Tel. & Tel. Co., 162 So. 2d 916 (Fla. Dist. Ct. App. 1964); *Baier*, 361 N.E.2d at 1102; Lafayette Orthopedic Clinic v. Guardianship of Bell, 670 N.E.2d 956, 958 (Ind. Ct. App. 1996); Barreca v. Cobb, 668 So. 2d 1129 (La. 1996); Foremost Life Ins. Co. v. Waters, 337 N.W.2d 29 (Mich. Ct. App. 1983); United Servs. Auto. Ass'n v. Hills, 109 N.W.2d 174, 175 (Neb. 1961); Amica Mut. Ins. Co. v. Maloney, 903 P.2d 834, 837 (N.M. 1995); Wiswell v. Shelby Mut. Ins. Co., 515 N.E.2d

issue or not had opportunity to apply the doctrine in the context of insurance subrogation. Nevertheless, it should be noted that there is no logical reason to limit the doctrine to class actions and trust cases. The imposition of a trust or class action requirement "would be inconsistent with the equitable foundations of the common benefit exception. . . . The form of suit is not a deciding factor; rather, the question to be determined is whether a plaintiff, in bringing a suit either individually or representatively, has conferred a benefit on others."[135] This position is consistent with that of the United States Supreme Court in *Sprague v. Ticonic National Bank*,[136] wherein it was observed that "the absence of an avowed class suit . . . hardly touch[es] the power of equity in doing justice as between a party and the beneficiaries of his litigation."[137]

1214, 1216 (Ohio Ct. App. 1986); *Clinton*, 518 P.2d at 647; Caldwell v. Keystone Ins. Co., 243 A.2d 448 (Pa. Super Ct. 1968); Peppertree Resorts Ltd. v. Cabana Ltd., 431 S.E.2d 598, 600 (S.C. Ct. App. 1993); Tennessee Farmers Mut. Ins. Co. v. Pritchett, 391 S.W.2d 671, 674 (Tenn. Ct. App. 1964); State Farm Mut. Auto. Ins. Co. v. Elkins, 451 S.W.2d 528 (Tex. App. 1970); Metropolitan Life Ins. Co. v. Ritz, 422 P.2d 780 (Wash. 1967); State Farm Mut. Auto. Ins. Co. v. Geline, 179 N.W.2d 815 (Wis. 1970).

135. *Tandycrafts, Inc.*, 562 A.2d at 1166 (quoting Reiser v. Del Monte Properties Co., 605 F.2d 1135, 1139-40 (9th Cir. 1979)); *see also* Citizens Action Coalition v. PSI Energy, Inc., 664 N.E.2d 401 (Ind. Ct. App. 1996).

136. 307 U.S. 161 (1939).

137. *Id.* at 167.

TRADE SECRETS IN INDIANA: PROPERTY VS. RELATIONSHIP

LYNN C. TYLER*

INTRODUCTION

It is no secret that intellectual property is currently one of the fastest-growing areas of legal practice. In this increasingly competitive world, businesses are continually striving to differentiate themselves from their competitors. Frequently, innovation—a new product (or at least a new feature) or a new service—is the key to differentiation. When a business has invested in developing something innovative, it wants to protect that investment. Legally, the different forms of available protection primarily include copyrights, patents, trademarks, trade dress, and trade secrets. This Article will address the law of trade secrets in Indiana.

Historically, there have been two competing views of trade secret law in the United States, the "relationship" view and the "property" view.[1] Under the relationship view, a plaintiff can successfully assert a claim for theft of trade secrets against a defendant who misappropriated the plaintiff's information to which the defendant had access because of a confidential relationship, such as employment.[2] Because of the abuse of the confidential relationship, the plaintiff can prevail even if the information is not otherwise secret.[3] In contrast, under the property view the plaintiff's information must be secret for the plaintiff to prevail, even if the defendant originally obtained access to the information through a confidential relationship.[4]

This Article will demonstrate that Indiana appears to follow the property view of trade secrets. Indiana has enacted the Uniform Trade Secrets Act,[5] which adopts the property view, and the vast majority of cases decided by federal courts which apply Indiana law have adopted the property view. Although the Indiana Supreme Court's decision in *Amoco Production Co. v. Laird*[6] contains some language that arguably endorses the relationship view,[7] this Article demonstrates that it is unlikely that the court adopted the relationship view in that decision: to do so, the court would have ignored the Indiana Uniform Trade Secrets Act, which it was interpreting, and the court did not even cite any of the federal cases

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1. *See* Miles J. Feldman, *Toward a Clearer Standard of Protectable Information: Trade Secrets and the Employment Relationship*, 9 HIGH TECH. L.J. 151, 163 (1994).
2. *Id.* at 162.
3. *Id.*; *see also infra* note 11 and accompanying text.
4. Feldman, *supra* note 1, at 163.
5. IND. CODE §§ 24-2-3-1 to -8 (1993).
6. 622 N.E.2d 912 (Ind. 1993).
7. *See infra* notes 86-89 and accompanying text.

on point.

I. RELATIONSHIP VS. PROPERTY: A BATTLE OF LEGAL GIANTS

The "relationship" view of trade secrets is often attributed to the 1917 opinion of Justice Holmes in *E.I. Du Pont De Nemours Powder Co. v. Masland*.[8] Du Pont sued Masland to prevent him from disclosing alleged trade secrets he had learned during his employment.[9] The district court enjoined Masland from disclosing the alleged secret to potential witnesses or experts before trial and he appealed. The court of appeals reversed, and the Supreme Court granted certiorari.[10] Having noted that the case was presented as a conflict between a property right and the right to defend the case, Justice Holmes wrote:

> We approach the question somewhat differently. . . . Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be. *Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiff*. . . .[11]

In other words, according to Justice Holmes, Du Pont was entitled to protection against disclosure of its information by Masland, without regard to whether the information was in fact a trade secret, because Masland had acquired the information in a confidential (employment) relationship.[12]

The Seventh Circuit applied the relationship view in *Shellmar Products Co. v. Allen-Qualley Co.*[13] Allen-Qualley had disclosed an invention (candy bar wrap and the processes and machinery for making it) to Shellmar in confidence.[14] Allen-Qualley obtained an injunction against Shellmar's use of its methods to produce the wrap.[15] After certain patents had issued which disclosed the wrap and process, Shellmar sought relief from the injunction on the ground the

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8. 244 U.S. 100 (1917).

9. *Id.*

10. *Id.* at 102.

11. *Id.* (emphasis added).

12. Sixty-seven years after Justice Holmes' famous decision in *Masland*, the Supreme Court limited its holding. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Supreme Court referred to the quotation in the text as dictum and stated: "Justice Holmes did not deny the existence of a property interest; he simply deemed determination of the existence of that interest irrelevant to resolution of the case." *Id.* at 1004 n.9. The Court further noted that an earlier opinion by Justice Holmes "had spoken of trade secrets in property terms." *Id.* (citing Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236, 250-53 (1905)).

13. 87 F.2d 104 (7th Cir. 1936).

14. *Id.* at 105.

15. *Id.* at 104; *see also* Allen-Qualley Co. v. Shellmar Prods. Co., 31 F.2d 293 (N.D. Ill.), *aff'd*, 36 F.2d 623 (7th Cir. 1929).

information was no longer secret.[16] The Seventh Circuit affirmed the district court's denial of relief, however, stating that "the consensus of authority is that by its inequitable conduct [Shellmar] has precluded itself from enjoying [the rights of the general public to] the patent disclosure . . . ."[17] Justice Holmes's opinion in *Du Pont v. Masland* was one of the decisions cited by the court in support of this proposition.[18]

In contrast to Justice Holmes's relationship view, Judge Learned Hand espoused the property view in *Conmar Products Corp. v. Universal Slide Fastener Co.*[19] Conmar sued Universal for patent infringement and for inducing former employees of Conmar to divulge alleged trade secrets in breach of a confidentiality agreement.[20] Out of seven alleged trade secrets, six and part of the seventh were disclosed in patents assigned to Conmar.[21] In these circumstances, Judge Hand held that the defendant was not liable in the absence of an express agreement to maintain the alleged secrets in confidence after the patents issued:

> [W]e do not see why a wrongful inducement to divulge the disclosure before issue should deprive the wrongdoer of his right to avail himself of the patentee's dedication [of the invention to the public] . . . . The doctrine must rest upon the theory that it is a proper penalty for the original wrong to deny the wrongdoer resort to the patent; and for that we can find no support in principle. Thus, any possible liability for exploiting whatever the patents in suit disclosed, ended with their issue.[22]

In other words, under the property view, "[t]he starting point in every case of this sort is not whether there was a confidential relationship, but whether, in fact, there was a trade secret to be misappropriated."[23] According to Judge Hand, because the patents had put the alleged secrets in the public domain, the defendant could not be liable even if it obtained the information through breach of a confidential relationship.

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16. *Shellmar Prods.*, 87 F.2d at 105.

17. *Id.* at 108.

18. *Id.* The court also cited *A.O. Smith Corp. v. Petroleum Iron Works Co.*, 74 F.2d 934 (6th Cir. 1935).

19. 172 F.2d 150 (2d Cir. 1949); *see also* Picard v. United Aircraft Corp., 128 F.2d 632 (2d Cir. 1942) (Hand, J.).

20. *Conmar Prods.*, 172 F.2d at 154.

21. *Id.*

22. *Id.* at 156.

23. Van Prods. Co. v. General Welding & Fabricating Co., 213 A.2d 769, 780 (Pa. 1965) (A footnote citing *E.I. DuPont De Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917), for the relationship view has been omitted.). The *Van Products* court cited *National Starch Products, Inc. v. Polymer Industries, Inc.*, 79 N.Y.S.2d 357 (N.Y. App. Div. 1948), in support of the property view. *Id.*

II. INDIANA AND THE PROPERTY VIEW

Surprisingly, it appears that neither the Indiana Supreme Court nor the Indiana Court of Appeals has ever squarely addressed whether Indiana follows the property or relationship view of trade secrets.[24] In 1982, Indiana adopted its version of the Uniform Trade Secrets Act (the "Act").[25] As shown below, the Act follows the property view. Furthermore, seven cases decided by federal courts, applying Indiana law, have actually or at least apparently adopted the property view of trade secrets and only one adopted the relationship view.[26]

The Act allows both injunctions[27] and damages[28] for "misappropriation," which is defined as either (1) the acquisition of or (2) the disclosure or use of a "trade secret" of another under certain circumstances, including breach of a confidential relationship.[29] The Act in turn defines a "trade secret" as follows:

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process, that:
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> > (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> > (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[30]

By basing a right to relief on misappropriation and incorporating the definition of trade secret into the definition of misappropriation, the Act adopts the property view. To prove misappropriation, the plaintiff must prove that the device, method, or information at issue qualifies as a trade secret.[31] If there is no secret,

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24. *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235 (Ind. 1955), and *Westervelt v. National Paper & Supply Co.*, 57 N.E. 552 (Ind. 1900), have been cited as adopting the property view. *See* ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 1.01[2], at 1-9 (1983). *Donahue* was a non-compete case, not a trade secret case. In *Donahue*, the Indiana Supreme Court stated that trade secrets were property rights that gave an employer a legitimate interest to support a non-compete agreement. 127 N.E.2d at 240. The case did not address whether Indiana follows the property or relationship view of trade secrets. In *Westervelt*, the defendant argued that it should not be liable for using the plaintiff's trade secrets or confidential information because the information was available in published patents. The court held that the defendant had waived the argument, however, by failing to include the evidence in the record on appeal. 57 N.E. at 555. Thus, the issue was presented but not decided.

25. IND. CODE §§ 24-2-3-1 to -8 (1993).

26. *See infra* text accompanying notes 30-87.

27. IND. CODE § 24-2-3-3 (1993).

28. *Id.* § 24-2-3-4.

29. *Id.* § 24-2-3-2.

30. *Id.*

31. "For liability to exist under [the Uniform Trade Secrets Act], a section 1(4) trade secret

then there is no misappropriation (and no claim) under the Act regardless of whether the defendant obtained access to the device, method, or information through a confidential relationship. Under the Act, "[t]he starting point . . . is not whether there was a confidential relationship, but whether, in fact, there was a trade secret to be misappropriated."[32]

The first of several federal cases to apply Indiana law to this question was *Northup v. Reish*.[33] Beginning in early 1945, Northup conceived the idea of using a thin sheet of aluminum foil under food in an oven to catch any drippings.[34] In mid-1946, Northup met with Reish and others, all of whom were officers of Consumer Products Corporation. After obtaining Reish's assurance that he would treat Northup's idea confidentially, Northup disclosed his idea, samples, and marketing information to Reish, and discussed the possibility of having Consumer Products manufacture the aluminum liners.[35] In November 1946, Northup began manufacturing and selling the liners himself. In November 1947, another company began manufacturing and selling the liners for Reish, and Northup sued for patent infringement and unjust enrichment.[36]

The district court found for Northup on his unjust enrichment claim, but the Seventh Circuit reversed.[37] Although purporting to approve of its earlier decisions in *Allen-Qualley* and similar cases, the court stated that those decisions did not apply "where, as here, the plaintiff has made a full disclosure to the public long before the defendant started to manufacture and sell the article."[38] In other words, even though Reish had obtained information about Northup's product through a confidential relationship, once Northup made the product public, he had no confidential information to be misappropriated and Reish was free to use it.[39] Thus, by relying on the nature of the information rather than on the nature of the relationship, *Northup* adopted the property view of trade secrets, its approval and attempted distinction of *Allen-Qualley* notwithstanding.

The second case to consider this question was *Skoog v. McCray Refrigerator Co.*[40] In *Skoog*, the plaintiffs invented a space-saving cabinet for displaying refrigerated meat in a grocery store.[41] The plaintiffs installed the cabinet in their

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must exist. . . ." Commissioners' Prefatory Note, *Uniform Trade Secrets Act, reprinted in* ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS App. A, at A-2.1 (1993).

32. Van Prods. Co. v. General Welding & Fabricating Co., 213 A.2d 769, 780 (Pa. 1965).

33. 200 F.2d 924 (7th Cir. 1953).

34. *Id.* at 924.

35. *Id.* at 925.

36. *Id.* at 924.

37. *Id.* at 924, 929.

38. *Id.* at 929.

39. Of course, Reish would not have been free to use the information if Northup had obtained a valid patent, but the district court held his patent invalid and Northup did not appeal. *Id.* at 924.

40. 211 F.2d 254 (7th Cir. 1954).

41. *Id.* at 255-56.

store in November 1947, and filed a patent application in December 1947.[42] The following month, the plaintiffs tried to interest McCray Refrigerator in manufacturing the cabinet and eventually sent McCray two pictures of it.[43] Despite its response that it had no interest in the plaintiffs' cabinet, McCray came out with a similar product within a year.[44]

The plaintiffs sued McCray for patent infringement and theft of trade secrets.[45] The plaintiffs argued that McCray had obtained its trade secret through a confidential relationship.[46] In light of the public display of the cabinet in November 1947, however, the court affirmed a judgment for the defendant:

> We think it well established that there can be no confidential disclosure where there has been a prior disclosure to the public without reservation. . . . In Affiliated Enterprises, Inc. v. Gruber, the court held that "any property right based upon secrecy was lost as early, at least, as the first public exhibition."[47]

Because the public display of the cabinet preceded any relationship, confidential or otherwise, with McCray, *Skoog* does not clearly adopt either the relationship or property view. The language quoted above is ambiguous. The court could be saying that because the cabinet was displayed publicly (1) there was no confidential relationship, or (2) there was no trade secret.[48]

Boop v. Ford Motor Co.[49] was the next case to address this issue under Indiana trade secret law. Boop alleged that he had developed a new method for mounting a corn picker on a Ford tractor and that Ford had converted his idea.[50] Judge Steckler held that to prevail on his claim for conversion of trade secrets, Boop had to prove "that the ideas [Ford allegedly] so acquired were new and novel and were utilized," among other things.[51] Finding that Boop's ideas were not "new and novel" as a matter of law, Judge Steckler entered summary

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42. *Id.* at 256.

43. *Id.*

44. *Id.*

45. *Id.* at 255.

46. *Id.* at 257.

47. *Id.* (citation omitted). Later in its opinion the court also wrote: "As we said in Smith v. Dravo Corp., 'Of course, as the term demands, the knowledge cannot be placed in the public domain and still be retained as a 'secret'. . . . That which has become public property cannot be recalled to privacy.'" *Id.* (citation omitted).

48. The plaintiffs' evidence of a confidential relationship was weak: the plaintiffs initially wrote McCray and offered to disclose their invention; McCray wrote back and stated it was always interested in something new, but disclaimed any obligations until it had determined that the plaintiffs had an invention; the plaintiffs then sent a picture of their cabinet to McCray without any reference to McCray's letter (or to confidentiality). *Id.* at 256.

49. 177 F. Supp. 522 (S.D. Ind. 1959), *aff'd*, 278 F.2d 197 (7th Cir. 1960).

50. *Id.* at 524. Boop also relied on theories of breach of contract and fraud. *Id.*

51. *Id.* at 526. The Seventh Circuit agreed with Judge Steckler on this point. *Boop*, 278 F.2d at 199-200.

judgment for Ford:

> The real question in this case is whether Boop's pickers contained any new and novel ideas which Ford utilized. On this there really is no genuine issue of fact. The affidavit of Clarence Richey contains reference to six patents . . . . It is well settled that disclosures in patents are matters in the domain of public knowledge.
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> . . . .
>
> Without analyzing these patents in detail, it is apparent that all of the principal features of Boop's two pickers, and indeed much more, is disclosed by the patents.[52]

By entering summary judgment for Ford based solely on Boop's failure to raise an issue of fact on whether his ideas were new, Judge Steckler followed the property view. Further evidence that Judge Steckler applied the property view in *Boop* lies in his holding that whether Ford had been in any confidential relationship with Boop was irrelevant to the proper decision of the case.[53]

The next federal court case to adhere to the property view of trade secrets as the law in Indiana was *Nickelson v. General Motors Corp.*[54] In that case, defendant Crull had worked with the chrome plating process for several years, including twelve years for a division of GM.[55] In 1953, Crull left GM and went to work in Texas.[56] While in Texas, he developed a secret process for chrome plating tools, called the "Armoloy Process", and convinced Monarch Manufacturing Company to invest the money to develop the process.[57] In 1955, he assigned the process to Monarch and entered a contract in which he agreed not to disclose the process for ten years.[58] After Monarch's successor[59] discontinued its chrome plating operation in September 1958, Crull went to work for Delco-Remy where he used the "Armoloy Process" under another name.[60] The plaintiff, Nickelson, purchased the Armoloy division from Monarch's successor in October 1958, and later sued Crull for breach of a confidential relationship in disclosing the "Armoloy Process" to Delco-Remy, and sued GM for improperly

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52. 177 F. Supp. at 530 (citing Conmar Prods. Corp. v. Universal Slide Fastener Co., 172 F.2d 150 (2d Cir. 1949)). Later in the opinion Judge Steckler wrote that "an examination of the mass of material in the affidavits indicates that there are no major features of either of the Ford pickers which were not disclosed in either issued patents or competing pickers." *Id.* at 531. Again, the Seventh Circuit agreed. *Boop*, 278 F.2d at 200.

53. 177 F. Supp. at 529.

54. 361 F.2d 196 (7th Cir. 1966).

55. *Id.* at 197.

56. *Id.*

57. *Id.* at 197-98.

58. *Id.* at 198.

59. Monarch merged with Fort Worth Steel and Machinery in 1955. *Id.*

60. *Id.*

using the alleged trade secret.[61]

Even though Crull had been employed by Monarch and its successor, had assigned the "Armoloy Process" to Monarch, and had agreed in writing not to disclose the process for ten years, the district court found for the defendants (and the Seventh Circuit affirmed) because there was no trade secret.[62] The Seventh Circuit summarized its analysis as follows:

> The [District] Court also found, as facts, that all of the steps specified in the "Armoloy Process" were known in and used by the chrome plating industry before Crull was employed by Monarch Manufacturing Company. The Court further found that the process used at Delco-Remy after Crull's employment there, did not utilize anything not previously known to defendant General Motors.
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> The Restatement of the Law of Torts, Section 757, Comment (b) states: "The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret."[63]

The *Nickelson* decision thus applied the property view because the starting (and ending) point of the Seventh Circuit's analysis was whether the "Armoloy Process" was a secret. The facts that Crull had agreed not to disclose the process and had been in a confidential relationship with the plaintiff's predecessor in interest, facts which would have been dispositive in favor of the plaintiff under the relationship view, were irrelevant to the court's analysis.

The fifth federal case on this issue was *Koehring Co. v. National Automatic Tool Co.*[64] Koehring sued NATCO for patent infringement and theft of trade secrets.[65] On the trade secret claim, Koehring alleged that certain former employees (Powell, Norman and Sherer) had left Koehring, joined NATCO, and taken to NATCO prints of Koehring drawings, "Supplements to Proposals" showing performance data of Koehring machines, an "Engineering Standards Book," and a "Data Book."[66] Judge Dillin found that certain information related to two patents had been confidential.[67] He further held, however, that Koehring failed to prove that any other information was a trade secret:

> The layout, assembly and some detail prints were freely furnished to purchasers; the "Supplements to Proposals" were widely distributed by the sales force; and the Standards Book contained primarily material to be found in any textbook on engineering. The Data Book contained

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61. *Id.*
62. *Id.* at 199.
63. *Id.*
64. 257 F. Supp. 282 (S.D. Ind. 1966), *aff'd*, 385 F.2d 414 (7th Cir. 1967).
65. *Id.* at 285.
66. *Id.* at 291.
67. *Id.*

> prints of detail drawings, but the machines to which such prints pertained were sold to the public, so that the details could have been obtained by disassembly, measurement and analysis . . . . *There can be no confidential information or trade secret in that which has previously been disclosed to the public without reservation.*[68]

Although Judge Dillin rejected Koehring's tort claim for theft of trade secrets, he did allow Koehring to recover for unjust enrichment because the defendant "obtained the benefit of its employees' unwarranted use of the [Koehring] materials."[69] It is unclear from the opinion whether this unwarranted use related to the confidential information from the two patents or use of the non-confidential information. Judge Dillin's opinion was affirmed on appeal.[70]

Eaton Corp. v. Appliance Valves Co.[71] was the next federal decision on this question. Eaton manufactured water inlet valves for dishwashers and other appliances.[72] Donahue and Krzewina were Eaton employees who had signed confidentiality agreements.[73] After working for Eaton for several years, Donahue and Krzewina decided to form their own company, Appliance Valves ("AVC").[74] On AVC's first day of manufacturing water inlet valves, Eaton sued for misappropriation of trade secrets, among other things.[75]

Judge Sharp found that Eaton had failed to prove that the defendants had stolen any trade secrets:

> The AVC valve does not incorporate any features of the Eaton valve which may properly be claimed as trade secrets of Eaton or confidential information. All of the features of the Eaton valve are either on file in the U.S. Patent Office and disclosed as patents, expired or unexpired, or in patent applications, or they can be discovered by any knowledgeable person reasonably skilled in the industry from an examination of any one of the millions of Eaton valves available in the market or from customers of Eaton, or from an examination of the similar Horton or Singer valves.[76]

Even though Donahue and Krzewina had been in a confidential relationship with Eaton, Judge Sharp's factual findings were fatal to Eaton's claim. In an earlier opinion denying Eaton's motion for preliminary injunction, Judge Sharp wrote:

> The law of trade secrets requires a showing that a business'

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68. *Id.* (emphasis added) (citing Skoog v. McCray Refrigerator Co., 211 F.2d 254 (7th Cir. 1954); Northup v. Reish, 200 F.2d 924 (7th Cir. 1953)).

69. *Id.*

70. *See Koehring*, 385 F.2d at 414.

71. 634 F. Supp. 974 (N.D. Ind. 1984), *aff'd*, 790 F.2d 874 (Fed. Cir. 1986).

72. *Id.* at 976.

73. *Id.* at 978.

74. *Id.* at 977.

75. *Id.* at 976, 978.

76. *Id.* at 979.

> information is secret before a court will enforce efforts to prevent disclosure or use of such information. As stated in Smith v. Dravo Corp., "Knowledge cannot be placed in the public domain and still be retained as a 'secret' . . . . That which has become public property cannot be recalled to privacy."[77]

Judge Sharp adhered to this view after the trial on the merits.[78] The Federal Circuit affirmed Judge Sharp's opinion.[79]

The seventh and final federal case on this issue is another opinion by Judge Dillin, *Eli Lilly & Co. v. EPA*.[80] Lilly submitted certain data to the EPA under the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[81] After certain amendments to FIFRA in 1972, "Lilly was explicitly assured that the EPA would not disclose publicly, or consider in connection with the application of another, any data submitted by Lilly, if both Lilly and the EPA determined the data to constitute trade secrets."[82] In light of this assurance, Judge Dillin held that if the EPA disclosed Lilly's confidential data or considered it in connection with another company's application, "[s]uch disclosure or consideration of research data, to the extent such data are cognizable as a trade secret property right under Indiana law . . . would constitute a 'deprivation' of property."[83] In other words, even though the EPA had an obligation of confidentiality, its disclosure or use of Lilly's data would not have deprived Lilly of property unless "such data [were] cognizable as a trade secret property right under Indiana law."[84] The starting point was whether Lilly had a trade secret to protect, and this is the property view.

In contrast to this long line of federal cases applying Indiana law and adopting the property view, the only federal case which purports to apply Indiana law and adopts the relationship view is *In re Uni-Services, Inc.*[85] In *Uni-Services*, the trustee in Uni-Services's bankruptcy proceeding sued the debtor's former president, Dudenhoffer, to enjoin him from competing against the debtor. In the course of its analysis, the Seventh Circuit wrote:

> Our inquiry is not how others could have acquired the data; but rather, how did Dudenhoffer acquire it? Dudenhoffer gained his knowledge of Crystal's trade data in confidence. Use of information gained through lawful inspection and surveillance cannot be restricted;

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77. Eaton Corp. v. Appliance Valves Corp., 526 F. Supp. 1172, 1179 (N.D. Ind. 1981) (citations omitted), *aff'd*, 688 F.2d 842 (7th Cir. 1982) (citing Skoog v. McCray Refrigerator Co., 211 F.2d 254 (7th Cir. 1954)).

78. 634 F. Supp. at 986.

79. *See Eaton*, 790 F.2d at 874.

80. 615 F. Supp. 811 (S.D. Ind. 1985).

81. 7 U.S.C. §§ 136-136y (1994).

82. 615 F. Supp. at 820.

83. *Id.*

84. *Id.*

85. 517 F.2d 492 (7th Cir. 1995).

use of the same information disclosed in confidence may be restricted.[86]

By framing the issue as how Dudenhoffer acquired an alleged trade secret, and not how others could have acquired it, the Seventh Circuit endorsed the relationship view. *In re Uni-Services* should not be persuasive as a statement of Indiana law, however. First, the Seventh Circuit relied solely on *Smith v. Dravo Corp.*[87] as support for this proposition.[88] *Smith v. Dravo Corp.*, however, applied Pennsylvania law, not Indiana law.[89] Second, the *Uni-Services* court did not distinguish, discuss, or even cite any of the other federal cases, reviewed above, which have adopted the property view as Indiana law.

In 1993, the Indiana Supreme Court rendered its landmark decision in the trade secret case of *Amoco Production Co. v. Laird.*[90] The court held that "where the duplication or acquisition of alleged trade secret information requires a substantial investment of time, expense, or effort, such information may be found 'not being readily ascertainable' so as to qualify for protection under the Indiana Uniform Trade Secrets Act."[91] The supreme court rejected the Indiana Court of Appeals' standard that information had to be "economically infeasible" to acquire in order to qualify as a trade secret.[92]

In its analysis of the meaning of "not readily ascertainable," the court reviewed the law of several other states. The court observed that in Illinois "[e]ven if information potentially could have been duplicated by other proper means, it is `no defense to claim that one's product could have been developed independently of plaintiff's, if in fact it was developed by using plaintiff's proprietary designs.'"[93] Since the decision in *Amoco Production*, some lawyers appear to have construed this portion of the supreme court's opinion to have adopted the relationship view. For example, one author has written that *Amoco Production* rejects "a simple hindsight test of what 'could have' been."[94] While not explicit (and perhaps not intended), this quotation suggests that *Amoco Production* endorsed the relationship view because it held that even if the defendant could have gotten the information from a public source (so there was no secret), the defendant is liable if it obtained the alleged trade secret through abuse of a confidential relationship.

For several reasons, *Amoco Production* does not support the relationship

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86. *Id.* at 496.

87. 203 F.2d 369 (7th Cir. 1953).

88. *See In re Uni-Services*, 517 F.2d at 496.

89. *See Dravo Corp.*, 203 F.2d at 373.

90. 622 N.E.2d 912 (Ind. 1993).

91. *Id.* at 919.

92. *Id.* at 917-19. The economic infeasibility standard first appeared in *Xpert Automation Sys. Corp. v. Vibromatic Co.*, 569 N.E.2d 351 (Ind. Ct. App. 1991).

93. *Amoco Prod.*, 622 N.E.2d at 918 (quoting Televation Communication Sys., Inc. v. Saindon, 522 N.E.2d 1359, 1365 (Ill. App. Ct. 1988)).

94. Charles R. Reeves, *Survey of Indiana Trade Secret Law: UTSA Survives an Eleventh-Year Scare*, 27 IND. L. REV. 1193, 1193 (1994).

view as the law in Indiana. First, the Indiana Supreme Court did not reject a "could have" test in *Amoco Production.* Indeed, the court's holding was that information is "not readily ascertainable" within the meaning of the Act if duplicating the information requires a substantial investment of time, money, or effort.[95] A corollary of this holding is that the information is not a trade secret if the defendant could have duplicated the information without a substantial investment of time, money, or effort. Under the Act, if the information is not a trade secret, the defendant is not liable even if the defendant obtained access to the information as a result of a confidential relationship.[96] Thus, the defendant is not liable where it could have obtained the information without substantial effort or expense.

The second reason *Amoco Production* does not support the relationship view is that, as shown above, the Act adopts the property view. The court was interpreting the Act in *Amoco Production*, and it is unlikely the court would intentionally depart from the scheme adopted by the legislature. It is even less likely that it would do so *sub silentio.* The third reason is related. The majority of states follow the property view.[97] In *Amoco Production*, the court expressly recognized that "Indiana legislators, adopting the UTSA, sought the uniform application of UTSA definitions of trade secret consistent with the application of the act in other adopting jurisdictions."[98] It is highly unlikely that the court would depart from the law in a majority of states in an opinion which acknowledges that the Indiana General Assembly wanted to adhere to a uniform view.

A fourth reason that *Amoco Production* did not endorse the relationship view is that the court did not discuss the relationship and property views and did not even cite any of the federal cases discussed above, which applied the property view, as the law of Indiana. It is unlikely the court would have adopted the relationship view, and rejected the property view, without citing any of these cases.

A final reason that *Amoco Production* should not be read to adopt the relationship view is that the quotation above,[99] which arguably endorses that view, was simply part of the court's review of the law of other states on the meaning of "not readily ascertainable."[100] The court did not necessarily approve

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95. *See supra* note 91 and accompanying text.

96. IND. CODE § 24-2-3-1 (1993).

97. *See, e.g.*, MILGRIM, *supra* note 24, § 1.01[2]. Some of the cases cited by Milgrim include *National Surety Corp. v. Applied Sys., Inc.*, 418 So. 2d 847 (Ala. 1982); *State Dep't Natural Resources v. Arctic Slope Reg'l Corp.*, 834 P.2d 134 (Alaska 1991); *Greenly v. Cooper*, 143 Cal. Rptr. 514 (Cal. Ct. App. 1978); *Thomas v. Best Mfg. Corp.*, 218 S.E.2d 68 (Ga. 1975); *Murphy v. Murphy*, 328 N.E.2d 642 (Ill. App. Ct. 1975); *Mann v. Tatge Chem. Co.*, 440 P.2d 640 (Kan. 1968); *Vigitron, Inc. v. Ferguson*, 419 A.2d 1115 (N.H. 1980); *Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.*, 492 N.E.2d 814 (Ohio 1986).

98. *Amoco Prod.*, 622 N.E.2d at 917 (footnote omitted).

99. *See supra* note 93 and accompanying text.

100. *See Amoco Prod.*, 622 N.E.2d at 918-19.

of any of the decisions by other courts that it reviewed. Indeed, the only conclusion the court drew from the review is that no other jurisdiction had adopted the "economically infeasible" standard applied by the Indiana Court of Appeals.[101] The supreme court rejected this standard in part because it would have been "unique to Indiana."[102] Thus, the court's reference to an Illinois case cannot be removed from its context and asserted as the law of Indiana.

For these reasons, Indiana appears to follow the property view of trade secrets. If the product, method, or information alleged to be a trade secret is not in fact secret, the defendant cannot be liable for misappropriation of a trade secret regardless of how it obtained the product, method or information from the plaintiff.[103] Furthermore, Indiana courts should follow the property view. Most importantly, the Indiana General Assembly enacted the property view into law when it passed the Act. The property view is also consistent with the Patent Act.[104] A person who receives a patent obtains a statutory right to exclude others from making or practicing his or her invention for the statutory period.[105] Subject to that limited right, however, the information in the patent becomes part of the public domain. All are free to use it, even if they first learned it through a confidential relationship with the patentee.[106] Thus, the property view of trade secrets is the better view, which no doubt accounts for its current status as the majority view among the states, including Indiana.

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101. *Id.* at 919.

102. *Id.*

103. The defendant may be liable for some other tort, such as conversion, but other possible grounds of liability are beyond the scope of this article.

104. 35 U.S.C. §§ 1-376 (1994).

105. *Id.* §§ 271, 281.

106. *See, e.g.*, Conmar Prods. Corp. v. Universal Slide Fastener Co., 172 F.2d 150, 155 (2d Cir. 1949).

THE JUSTICE SYSTEM IN JEOPARDY: THE PROHIBITION ON GOVERNMENT APPEALS OF ACQUITTALS

JOSHUA STEINGLASS*

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INTRODUCTION

The "trial of the century" ended two years ago when the jury acquitted O.J. Simpson of murder after just four hours of deliberation. In a trial plagued by gross judicial error favoring both sides, the government found itself without recourse in the appellate court system. Mr. Simpson's team of high-priced attorneys, however, had long since begun to scrutinize the trial record for appealable errors that would allow him to challenge a conviction. This asymmetry in the right of appeal has produced a series of problems in the administration of the criminal law.

This Article briefly surveys the various rationales that support the prohibition on government appeals of acquittals. The Article then takes a critical perspective on these purported rationales and demonstrates how their periodic application has produced a virtually incoherent body of precedent. Thirty years ago, one commentator wrote that "policy confusion is the chief confusion in double

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jeopardy law."[1] These words are even more true today in light of the barrage of overturned cases and futile attempts to distinguish the indistinguishable that have characterized the more recent decisional law in this area. The Article then analyzes a host of problems generated by the prohibition on government appeals. Finally, the Article advocates permitting government appeals of erroneous acquittals and addresses potential objections to such endeavors.

I. A BRIEF HISTORY

Opponents of reform are quick to point out that the prohibition on government appeals extends back to pre-colonial English common law. At common law neither the state nor the defendant could appeal the judgment of the trial court.[2] The defendant could, however, obtain a writ of grace from the crown if the proceedings were found to be grossly violative of his rights.[3] It must also be recalled that criminal defendants enjoyed far less protection from prosecutorial abuse at that time than they do now.[4]

Initially, judicial consideration of the Double Jeopardy Clause of the Fifth Amendment[5] rested on statutory rather than constitutional analysis. In *United States v. Sanges*,[6] the Court held that the government had no right of appeal in a criminal case absent statutory authorization.[7] The maxim of strict interpretation of statutes in derogation of the common law required that the authorization be explicit and unambiguous.[8]

Around the turn of the century, however, several successive Attorney

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1. Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 266 n.14 (1965).

2. *See* Bartkus v. Illinois, 359 U.S. 121, 152 n.5 (1959) (Black, J., dissenting); *Ex Parte* Lange, 85 U.S. 163, 169 (1873); State v. Lee, 30 A. 1110, 1112 (Conn. 1894). *See generally* LESTER B. ORFIELD, CRIMINAL APPEALS IN AMERICA 61 (1939); JAY A. SIGLER, DOUBLE JEOPARDY (1969).

3. This is essentially the position taken by Justice Story. He thought that the Double Jeopardy Clause prohibited retrial following appeal by either the government *or* the defendant. *See Lange*, 85 U.S. at 201 ("[A] party shall not be tried a second time for the same offense after he has once been convicted or acquitted of the offense charged by the verdict of a jury, and judgment has passed theron for or against him.") (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1787 (2d ed. 1851)); *see also* OFFICE OF LEGAL POLICY OF THE UNITED STATES DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS 21 (1987) [hereinafter REPORT TO THE ATTORNEY GENERAL].

4. Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 343 (1956).

5. The relevant part of the Fifth Amendment reads, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

6. 144 U.S. 310 (1892).

7. *Id.* at 318.

8. *Id.*

Generals pressed for the expansion of statutory authorization.[9] The impetus for reform was underscored by the landmark 1904 decision, *Kepner v. United States*,[10] which held that government appeals of acquittals were prohibited by a statute using the same language as the Double Jeopardy Clause in the constitution.[11] *Kepner* and its progeny significantly expanded the common law protection against multiple trials and multiple punishments.[12] In 1907, Congress responded to the pressure with the Criminal Appeals Act.[13] The more radical House proposal, which contemplated virtual symmetry, was eviscerated by the Senate and the bill that passed the conference committee was rather limited.[14]

In *Palko v. Connecticut*,[15] the Court first addressed the question of whether the Due Process Clause of the Fourteenth Amendment incorporated the Double Jeopardy Clause, thus rendering it applicable against the states. With only one dissenter, the Court held that the prohibition against government appeals was not so fundamental to the concept of liberty that due process required its application to the states.[16] Thirty-two years later, the Court overruled *Palko* and incorporated the Double Jeopardy Clause.[17] About the same time, Congress entered the colloquy with significant amendments to the Criminal Appeals Act in 1968 and 1971. Together, these amendments provided a blanket statutory authorization of government appeals whenever such appeals would not be violative of the Fifth Amendment.[18] Particularly significant in determining Congressional intent was the final paragraph added in 1971 which mandated that "[t]he provisions of this section shall be liberally construed to effectuate its purposes."[19] The Court recognized that the Criminal Appeals Act was intended by Congress to remove all statutory barriers to government appeals, fully constitutionalizing the issue.[20]

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9. *See generally* United States v. Sisson, 399 U.S. 267, 293 (1970) (discussing recommendations of the Attorneys General of the United States, beginning in 1892, to pass legislation allowing government to appeal in criminal cases).

10. 195 U.S. 100 (1904).

11. *Id.* at 133-34. Kepner was tried in the Philippine Islands. Therefore, the Bill of Rights did not apply to him, but a statute containing several identically worded provisions did. In deciding the case on "statutory" grounds, the Court made it clear the governing principles were the same under the Constitution. *See id.* at 124, 133. Indeed, Kepner has been so interpreted.

12. *See* William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 413 (1993); Justin Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 492 n.36 (1927).

13. Criminal Appeals Act, ch. 2564, 34 Stat. 1246 (1907) (codified as amended at 18 U.S.C. § 3731 (1994)).

14. *See* United States v. Sisson, 399 U.S. 267, 294-96 (1970).

15. 302 U.S. 319 (1937).

16. *Id.* at 328.

17. Benton v. Maryland, 395 U.S. 784 (1969).

18. *See* 18 U.S.C. § 3731 (1994).

19. *Id.*; *see also* H.R. CONF. REP. No. 91-1768 (1970).

20. *See* United States v. Scott, 437 U.S. 82, 85 (1978); United States v. Wilson, 420 U.S. 332, 337-38 (1975).

II. DEBUNKING OSTENSIBLE RATIONALES

A. Values Protected by the Double Jeopardy Clause

The Supreme Court has stated that the Double Jeopardy Clause consists of "three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[21] The prohibition on retrials after acquittals has been given special weight.[22] Several policy justifications have been offered in defense of these prohibitions. Justice Black described the policy underlying the Double Jeopardy Clause in *Green v. United States*[23] as follows:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[24]

Numerous other Supreme Court decisions and academic articles have supplemented this list of rationales purportedly supporting the prohibition on government appeals of acquittals.[25] These rationales can be separated into five basic categories, and are described below in order of descending importance.

First, as the Court indicated in *Green*, the guarantee is said to minimize the anxiety, fear, and expense to the defendant associated with a second trial.[26] Defense attorney fees can be exorbitant and particularly burdensome to those whose financial situation just barely disqualifies them from receiving court-appointed counsel. In addition, defendants may have to forego salary and spend

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21. United States v. DiFrancesco, 449 U.S. 117, 129 (1980) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)) (footnotes omitted); *see also* Note, *supra* note 1, at 265-66.

22. *See DiFrancesco*, 449 U.S. at 129; United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

23. 355 U.S. 184 (1957).

24. *Id.* at 187-88; *see also Scott*, 437 U.S. at 87.

25. *See infra* notes 26-32 and accompanying text.

26. *See DiFrancesco*, 449 U.S. at 136; Serfass v. United States, 420 U.S. 377, 391 (1975); Illinois v. Somerville, 410 U.S. 458, 472 (1973) (White, J., dissenting); United States v. Jorn, 400 U.S. 470, 479 (1971); Downum v. United States, 372 U.S. 734, 741-42 (1963) (Clark, J., dissenting); *see also* REPORT TO THE ATTORNEY GENERAL, *supra* note 3, *passim*; Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 84. For the purposes of this discussion, we consider only the anxiety, expense, and fear that would accompany a second trial. Government appeals that are successful and would not require a retrial and government appeals of pre-trial motions would not involve these concerns.

time in jail if they are unable to make bail. Even if released on bail, pending criminal litigation may strictly limit a defendant's ability to travel and may also affect his or her ability to maintain employment. A second rationale behind the Double Jeopardy Clause is the desire to preserve finality in judicial proceedings.[27] Government appeals of acquittals would clearly lengthen the appellate court docket, and trial courts would be faced with retrials in cases where government appeals were successful. The third value protected by the Fifth Amendment guarantee recognized by the Court in *Green* is the reduction in the likelihood of a wrongful conviction.[28] The Supreme Court has expressed concern that authorizing government appeals of acquittals may permit the prosecutor to use a first trial as a discovery device.[29] The prosecution is likely to gain more than the defense from such a "dry run" because disclosure requirements are typically asymmetric. A fourth rationale behind the Double Jeopardy Clause, according to both courts and commentators, is the right of the accused to have his trial completed by a particular tribunal.[30] Finally, the Double Jeopardy Clause protects the jury's power to engage in nullification. Some commentators argue that this is the only tenable rationale behind the prohibition on government appeals of erroneous acquittals.[31] Each of these policy considerations will be examined in various contexts in which double jeopardy questions arise.[32]

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27. *See Scott*, 437 U.S. at 92 (referring to finality as a "primary purpose of the Double Jeopardy Clause"); Crist v. Bretz, 437 U.S. 28, 33 (1978); *Jorn*, 400 U.S. at 479; State v. Lee, 30 A. 1110, 1112 (Conn. 1894) (discussing common law protection from double jeopardy and stating that finality is the principle underlying common law rule); Lawrence J. Baldasare, Comment, *The Double Jeopardy Clause and Mistrials Granted on Defendant's Motion: What Kind of Prosecutorial Misconduct Precludes Reprosecution?*, 18 DUQ. L. REV. 103, 104 (1979).

28. *See DiFrancesco*, 449 U.S. at 130 (quoting *Green*, 355 U.S. at 188); *see also Scott*, 437 U.S. at 91, 101; James D. Gordon III, *Double Jeopardy and Appeal of Dismissals: A Before-and-After Approach*, 69 CAL. L. REV. 863, 865-66 (1981); Cathleen C. Herasimchuk, *Criminal Justice and the State's Right to Appeal*, 51 TEX. BAR. J. 242, 245 (1988); Note, *supra* note 1, at 266-67.

29. *DiFrancesco*, 449 U.S. at 128.

30. *See* Oregon v. Kennedy, 456 U.S. 667, 671-72 (1982); *DiFrancesco*, 449 U.S. at 128; Arizona v. Washington, 434 U.S. 497, 503 (1978). *But see* Wade v. Hunter, 336 U.S. 684, 689 (1949) (stating that defendant's right to trial by particular tribunal must, in some cases, be subordinated to public's interest in fair trials).

31. *See* Westen & Drubel, *supra* note 26, at 84; Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1012-23 (1980); Gordon, *supra* note 28, at 866-67. The Supreme Court has never explicitly recognized the Double Jeopardy Clause as protecting jury nullification. In a footnote in *DiFrancesco*, 449 U.S. at 130 n.11, Justice Blackmun quotes Professor Westen's nullification argument but suggests that it is simply another way of stating what the Court has said in *Green*, 355 U.S. at 184, and *Burks v. United States*, 437 U.S. 1 (1978). Neither *Green* nor *Burks*, however, involved jury nullification. *See Green*, 355 U.S. at 188; *Burks*, 437 U.S. at 16.

32. Professors Westen and Drubel catalogue the policy rationales somewhat differently. According to them, there are three basic interests which the Double Jeopardy Clause protects. First,

B. Problems with the Current State of Double Jeopardy Jurisprudence

1. Incoherent Precedents.—Perhaps the most striking aspect of Double Jeopardy Clause jurisprudence is its inconsistency. Barely distinguishable cases are routinely distinguished and the line separating the permissible from the impermissible becomes more crooked in each instance.[33] Recently decided cases are overruled with uncharacteristic frequency.[34] Such precedential confusion has been dubbed "doctrinal senility" by one commentator.[35] Justice Rehnquist himself wrote that "the decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[36] The waters have become even less navigable in the seventeen years since Justice Rehnquist's eloquent observation. A brief survey of the relevant precedents will demonstrate the untenable nature of the distinction between government appeals of erroneous acquittals and other repeat proceedings which the Court has held to be permissible.[37] The basic point is that the Court has indicated a willingness to depart from each of the values embodied by the Double

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the *defendant's* interest in finality is preserved (which includes his interest in avoiding embarrassment, expense, and ordeal; his interest in avoiding a continuing state of anxiety; the possibility of a wrongful conviction; and the right to the original tribunal). Westen & Drubel, *supra* note 26, at 85-106. Second, double jeopardy protects the interest in avoiding double punishment. *Id.* at 106-22. Finally, the interest in protecting jury nullification is protected. *Id.* at 122-55. There is little relevant difference between the first two subsets of Westen and Drubel's first interest. Both involve unpleasant circumstances for the defendant if there were to be a second trial. Together, they are identified here as the most important rationale. The possibility of wrongful conviction has implications beyond the individual defendant. It is also a systemic concern that should be considered separately. Similarly, the loss of the right to the first tribunal would not in and of itself necessarily adversely affect the defendant. It cannot be lumped together with anxiety and expense as unequivocal costs that must be borne by the defendant if he is retried. Westen and Drubel's second interest is less of a value underlying double jeopardy than a context in which it arises. The tripartite analysis which they employ also fails to acknowledge the interest of the judiciary in preventing cluttered court dockets—"finality" in the sense in which it is used here. *Green* notwithstanding, the categories utilized by this Article correspond more closely to judicial opinion and academic analysis. That said, the discussion here does not hinge upon the way in which the values underlying the Double Jeopardy Clause are categorized.

33. *See, e.g., infra* note 67 and accompanying text.

34. *See, e.g.*, United States v. Dixon, 509 U.S. 688 (1993) (overruling Grady v. Corbin, 495 U.S. 508 (1990)); United States v. Scott, 437 U.S. 82 (1978) (overruling United States v. Jenkins, 420 U.S. 358 (1975)); Benton v. Maryland, 395 U.S. 784 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)).

35. Note, *supra* note 1, at 264.

36. Albernaz v. United States, 450 U.S. 333, 343 (1981).

37. It is not my intention in this section to provide a comprehensive analysis of the legal topography, but rather to summarize current Supreme Court doctrine in order to appreciate the doctrinal inconsistencies.

Jeopardy Clause, even when several or all of them are implicated simultaneously. The relationship between the various contexts in which double jeopardy claims arise and the values ostensibly protected by the Double Jeopardy Clause are represented diagramatically on the chart in the Appendix. The chart is designed to accompany the following discussion and should be frequently referenced.

There is no doubt that pre-trial motions are appealable by the government.[38] In a jury trial, jeopardy is not said to "attach" until the jury is sworn.[39] In bench trials, jeopardy attaches when the court begins to receive evidence.[40] Appeal may be permitted if taken before jeopardy attaches even if there has been some factual inquiry.[41] The reason that government appeals of pre-trial motions do not violate double jeopardy is usually expressed in terms of our first rationale: "[w]hen a criminal prosecution is terminated prior to trial, an accused is often spared much of the expense, delay, strain, and embarrassment which attend a trial."[42] The chart indicates that only one of the double jeopardy values is implicated in the case of government appeals of pre-trial motions. A pre-trial ruling cannot be said to involve the same finality concerns involved in post-verdict appeals. Very little courtroom time has been wasted when pre-trial motions are in order. The interest in retaining the original tribunal, certainly, is not even touched upon when a jury has not been impaneled. Similarly, there is no possibility that a jury could engage in nullification before it is selected. The only double jeopardy case that can be made is that the likelihood of a wrongful conviction is increased any time the government is permitted to seek reversal of an unfavorable pre-trial motion. Evidently, the Court does not regard this value as important enough to preclude government appeals in the context of pre-trial motions.

Double jeopardy law concerning mistrials is more complicated. The key distinction the Court draws is whether or not the defendant meaningfully consented to the mistrial declaration.[43] When the defendant moves for a mistrial or consents to a motion for a mistrial by the prosecution or *sua sponte* mistrial declaration by the judge, retrial will likely be permitted.[44] In fact, retrial is permitted even if necessitated by prosecutorial or judicial error as long as it is not

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38. *See* Serfass v. United States, 420 U.S., 377, 394 (1975) (holding that government appeal of pre-trial order dismissing indictment was not barred by Double Jeopardy Clause); Herasimchuk, *supra* note 28, at 245.

39. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977); *Serfass*, 420 U.S. at 388.

40. *See Martin Linen*, 430 U.S. at 569; *Serfass*, 420 U.S. at 388.

41. *Serfass*, 420 U.S. at 390-91.

42. *Id.* at 391.

43. Oregon v. Kennedy, 456 U.S. 667, 683-86 (1982) (Stevens, J., concurring in part and dissenting in part); Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When is an Acquittal Not an Acquittal?*, 27 ARIZ. ST. L.J. 953, 966 (1995). The Court has refused to characterize a defendant's consent to mistrial with the knowledge that a new trial might take place as a waiver of double jeopardy claims. *See, e.g.*, United States v. Scott, 437 U.S. 82, 98-99 (1978); United States v. Dinitz, 424 U.S. 600, 608 (1976).

44. *See, e.g.*, United States v. DiFrancesco, 449 U.S. 117, 130 (1980).

in bad faith or intended to goad the defendant into moving for a mistrial.[45] Prosecutorial or judicial misconduct is not enough to bar retrial absent evidence that the conduct was intended to "harass or prejudice the [defendant]."[46] Thus, retrial was not barred when the judge expelled lead defense counsel after he had disregarded explicit warnings about his opening statement and the defendant consequently moved for a mistrial.[47] Similarly, retrial was permitted in a case where the defendant moved for a mistrial after the prosecutor asked a witness if the reason he did not do business with the defendant was because the latter "is a crook."[48] Returning to the chart, we find that at least two of the double jeopardy values are implicated in this situation. Whether retrial constitutes a significant financial and/or psychological burden on the defendant depends on the progress of the first trial when the mistrial was granted. Obviously, the costs to the defendant become more significant as the trial continues. The Court, however, does not draw any temporal distinctions. Further, permitting retrial after mistrial declarations increases the chances of wrongful conviction. This fact, too, does not make such retrials impermissible on double jeopardy grounds. The defendant's right to have his trial completed by the first tribunal also falls by the wayside when such retrials are permitted. Because the jury never reaches a verdict, neither the interest of the judiciary in finality nor the interest of the defendant in protecting jury nullification is implicated in this context.

Where a mistrial is granted over the objection of the defendant, the Court has adopted the "manifest necessity" test first articulated in *United States v. Perez*.[49] Retrial is permitted only when there is "a manifest necessity for the [mistrial declaration], or the end of public justice would otherwise be defeated."[50] Although the *Perez* Court stated that this "power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes,"[51] there is much deference to the trial court in the determination of manifest necessity.[52] The Court does not require an explicit finding of "manifest necessity," but rather permits retrial when "the mistrial order is supported by [a]

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45. *See* Arizona v. Washington, 434 U.S. 497, 508 (1978); *Dinitz*, 424 U.S. at 611, *overruled by Scott*, 437 U.S. at 82; *see also* Akhil Reed Amar & Johnathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 53 (1995); Baldasare, *supra* note 27, at 104.

46. *Dinitz*, 424 U.S. at 611. The focus on the intent of the prosecutor is necessarily difficult because the trial judge must engage in speculation. *See* Baldasare, *supra* note 27, at 131.

47. *Dinitz*, 424 U.S. at 611-12.

48. Oregon v. Kennedy, 456 U.S. 667, 669 (1982).

49. 22 U.S. (9 Wheat.) 579 (1824).

50. *Id.* at 580; *see also* United States v. DiFrancesco, 449 U.S. 117, 130 (1980); United States v. Wilson, 420 U.S. 332, 344 (1975); Downum v. United States, 372 U.S. 734, 736 (1963); Wade v. Hunter, 336 U.S. 684, 690 (1949); Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1276-81 (1964).

51. *Perez*, 22 U.S. at 579.

52. *See* Arizona v. Washington, 434 U.S. 497, 513-16 (1978); Baldasare, *supra* note 27, at 110-11.

high degree of necessity."[53]

The classic case in which a declaration of a mistrial, without the consent of the defendant, does not bar retrial is in the case of a hung jury.[54] If the jury acquits on some counts and is hung on others, retrial is permitted on the counts upon which the jury was hung.[55] Retrial is also permitted when the government moves for a mistrial because it discovers a defect in the indictment which is not curable by amendment, even though the defect was the fault of the prosecutor.[56] The potential for abuse is apparently outweighed by the futility involved in forcing the prosecution to complete a trial that would be automatically reversed if there were a conviction.[57] The Court also has allowed retrial when a mistrial was granted over the objection of the defendant because defense counsel made inappropriate allusions to prosecutorial misconduct that had necessitated a previous mistrial declaration.[58] Gross judicial error in *sua sponte* mistrial declarations has been held not to invoke a double jeopardy bar. In *Gori v. United States*,[59] the Court permitted retrial when the trial judge, on his own motion, declared a mistrial because he thought the prosecutor was *about* to introduce evidence of the prior convictions of the defendant.[60] The Court's decision to allow retrial was based partly on its belief that the trial judge in that case was said to be acting "in the sole interest of the defendant."[61] In another case, further proceedings were permitted after a wartime court martial was adjourned because of tactical developments and the unavailability of key witnesses due to illness.[62]

In other cases, the Court has held that a mistrial declaration barred reprosecution. For example, in *Downum v. United States*,[63] double jeopardy precluded retrial when a mistrial was declared because the first government witness was not in court and had not been served with a summons.[64] Even though a new jury was impaneled two days later and the witness was prepared to testify,[65] the Court deemed further prosecution impermissible. In reaching its

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53. *Washington*, 434 U.S. at 516.

54. *See, e.g., Perez*, 22 U.S. at 579.

55. Richardson v. United States, 468 U.S. 317 (1984). The Court relies on the fact that the original jeopardy never terminated. *Id.* at 325-26. The concept of continuing jeopardy was strongly defended by Justice Holmes in his famous dissent in *Kepner v. United States*, 195 U.S. 100, 134-135 (1904) (Holmes, J., dissenting). Elsewhere, the Court has vehemently rejected the concept of continuing jeopardy. *See, e.g., Jenkins*, 420 U.S. at 369; Green v. United States, 355 U.S. 184, 193 (1957). *See also infra* text accompanying notes 183-85.

56. Illinois v. Somerville, 410 U.S. 458, 466-71 (1973).

57. *Id.* at 469.

58. Arizona v. Washington, 434 U.S. 497, 510-14 (1978).

59. 367 U.S. 364 (1961).

60. *Id.* at 366-67.

61. *Id.* at 369.

62. Wade v. Hunter, 336 U.S. 684 (1949).

63. 372 U.S. 734 (1963).

64. *Id.* at 738.

65. *Id.* at 735.

conclusion, the Court placed much weight on the right of the accused to have the trial completed by the original tribunal[66]—a value which had been all but ignored in *Illinois v. Somerville*,[67] a remarkably similar case. Retrial was also barred in *United States v. Jorn*,[68] in which the judge declared a mistrial so that prosecution witnesses could discuss with their attorneys the possibility that their testimony would constitute self-incrimination.[69] The judge ordered the mistrial in spite of the prosecutor's assurance that the witnesses had been advised of their rights.[70]

Applying the rationales behind the Double Jeopardy Clause in the context of mistrials, it is difficult to discern any difference between mistrials declared with the consent of the defendant and those declared without his consent. Indeed, the chart indicates that the situations are identical. The attempt to distinguish between these two situations by invoking the Double Jeopardy Clause has produced contradictory results. In terms of the specific values that the Double Jeopardy Clause is said to protect, there should be no difference between *Gori* and *Jorn* or between *Somerville* and *Downum*. Rather, the only relevant inquiry should be whether the prosecution has abused its discretion and purposely attempted to induce a mistrial. It is only in those cases that the Double Jeopardy Clause should bar reprosecution. We shall return to this proposal in a later section.

Dismissals are another area in which retrials may or may not be precluded. The test is whether the trial judge's action, whatever its label, represents a resolution, correct or not, of some or all of the factual elements of the offense charged.[71] If so, the Court reasons that dismissal is tantamount to an acquittal.[72]

On the other hand, retrial is permitted when the defense moves for dismissal on grounds unrelated to guilt or innocence.[73] In *United States v. Scott*, for example, the Court allowed a second trial after the original trial judge granted a defense motion for dismissal based on a defective indictment.[74]

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66. *See id.* at 736.

67. 410 U.S. 458, 478 (1973) (Marshall, J., dissenting); *see also* McAninch, *supra* note 12, at 479.

68. 400 U.S. 470 (1971). *Jorn* is actually a four justice plurality opinion. Justices Black and Brennan held that the court had no jurisdiction over the case but sided with the plurality on the merits. *Id.* at 488.

69. *See id.* at 473.

70. *Id.*

71. *See* United States v. Scott, 437 U.S. 82, 87, 97 (1978) (overturning the three-year old holding in United States v. Jenkins, 420 U.S. 358 (1975)). The Court in *Jenkins* held that government appeals after dismissals were prohibited if they would require "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." *Jenkins*, 420 U.S. at 358. At least one commentator has argued that the new test fails to provide adequate protections for the defendant. *See generally* Gordon, *supra* note 28. *See also* United States v. Martin Linen Supply Co., 430 U.S. 564, 570 (1977).

72. Gordon, *supra* note 28, at 863.

73. *Scott*, 437 U.S. at 82.

74. *Id.* at 98-99. While rejecting the concept of waiver, the Court placed much emphasis

In other instances, the Court has held that the Double Jeopardy Clause bars retrial following dismissal. In *United States v. Martin Linen Supply Co.*,[75] the Court held that a judgment of acquittal following a hung jury is not appealable.[76] The decision appears at odds with the Court's holding in *United States v. Perez*.[77] If the evidence were truly so inadequate as to preclude any reasonable jury from returning a guilty verdict, then there was no reason to let the issue go to the jury in the first place. Certainly, the fact that the jury could not reach a verdict should not alter the manner in which the judge weighs the evidence in making this determination. At the very least, *Martin Linen* points out the difficulty in administering the *Scott* test to cases where the relevant judicial act involves mixed questions of law and fact.[78] If government appeals of erroneous acquittals were permitted, as this Article advocates, the *Scott* test would be irrelevant. Indeed, in terms of the values protected by the Double Jeopardy Clause, there is scant justification for a rule which permits retrial when the judge (erroneously or otherwise) grants a dismissal for a defective indictment after the trial is substantially underway, but prohibits it when the judge misapplies a legal standard to the facts and grants a dismissal. In both cases, the ordeal the defendant must face depends upon when the motion is granted, not upon whether it is based on a partial factual resolution or not. The same can be said for the increased chances of wrongful conviction and the loss of the defendant's right to the first jury. In neither case is there a verdict, thus the interest in finality and the interest in jury nullification are not implicated. Again, the values and rationales that underlie the Double Jeopardy Clause in the context of dismissals are neither fully adhered to nor explain the distinction drawn by the Court in *Scott*.

Judgments of acquittal notwithstanding the verdict (jnovs) provide yet

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on the fact that the defendant voluntarily moved for dismissal. *Id.* In doing so, the Court not only conflated the issue of voluntariness with the issue of factual resolution but also engaged in profoundly curious reasoning. It is a sheer mystery how the Court reconciled the two sentences in the following quotation: "We do not thereby adopt the doctrine of 'waiver' of double jeopardy rejected in *Green*. Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *Id.* at 99 (footnotes omitted). One cannot resist recalling a dialogue between an interviewer and the manager of an old rock and roll band in the 1984 movie, *This Is Spinal Tap*. Says the interviewer (Rob Reiner): "The last time Tap toured America, they were booked into 10,000 seat arenas and 15,000 seat venues and it seems that now, on the current tour, they're being booked into 1200 seat arenas and 1500 seat arenas and I was just wondering, does this mean that the popularity of the group is waning?" And the response from the manager: "Oh no no no no no no no no. Not at all. I . . . I . . . I just think the, uh, that their appeal is becoming more selective." *See also* Lee v. United States, 432 U.S. 23 (1977) (holding similarly despite judge's comments as to defendant's probable guilt or innocence).

75. 430 U.S. 564 (1977).

76. *Id.* at 575.

77. 22 U.S. (9 Wheat.) 579 (1824).

78. *Martin Linen*, 430 U.S. at 583 (Burger, C.J., dissenting).

another example of a context in which the Supreme Court has permitted government appeals.[79] In *United States v. Sisson*,[80] the Court held that directed verdicts after verdicts of conviction bar government appeal. However, the decision appears to be based upon a statutory interpretation of the Criminal Appeals Act before the blanket authorization granted by the 1971 amendments.[81] The appealability of such judgments does not hinge on the label assigned by the trial judge. Thus, the government could take an appeal from a post-verdict "dismissal" for pre-indictment delay.[82]

In upholding the government's right to appeal jnovs, the Supreme Court relies heavily on the fact that an appellate reversal would not necessitate retrial but could simply involve reinstatement of the original jury verdict. Aside from the fact that it is profoundly curious that an automatic reinstatement of a conviction is *less* constitutionally questionable than an order for a new trial, the fact that the defendant will not have to be retried concerns only two of the five double jeopardy values. True, the defendant will not have to undergo the ordeal of a second trial. Further, because there will be no retrial, the defendant's right to the original tribunal is not violated. The jury nullification rationale is also not implicated since there was never a jury acquittal. But government appeals of jnovs violate the finality interest of the judiciary, though not to the same extent as would a second trial. Finally, the chances of a wrongful conviction are certainly increased. It must be assumed that at least a small percentage of the criminal defendants who are convicted by the jury and then acquitted by the trial judge, but who have their convictions reinstated by the appellate court, are indeed factually innocent.

The Supreme Court has also held that the government may appeal sentences.[83] In *North Carolina v. Pearce*,[84] the Court held that a retrial following an appeal by the defense could result in a longer sentence than the one originally given so long as the heftier sentence was not imposed as a punishment for taking the appeal in the first place.[85] Eleven years later, the Court held that the government can appeal sentences directly, without an intervening trial granted

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79. *See* United States v. Ceccolini, 435 U.S. 268, 270-71 (1978); REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 2; Herasimchuk, *supra* note 28, at 245.

80. 399 U.S. 267 (1970).

81. *Id.* at 286.

82. *See* United States v. Wilson, 420 U.S. 332, 352-53 (1975). The decision did not turn on the fact that the dismissal was predicated on nonfactual grounds. The Court treated the trial judge's action as a judgment notwithstanding the verdict.

83. United States v. DiFrancesco, 449 U.S. 117, 132 (1980); *see also* Richard P. O'Hanley III, *Double Jeopardy and Prosecutorial Appeal of Sentences:* DiFrancesco, Bullington, *and the Criminal Code Reform Act of 1981*, 35 VAND. L. REV. 709, 710-11 (1982).

84. 395 U.S. 711, 724 (1969).

85. *Id.* The dissenters from *Pearce* and its progeny liken the situation to that in *Green*. They reasoned that the original sentence constituted an "implied acquittal" of any greater sentence and should therefore be barred. *Id.* at 745-46 (Harlan, J., concurring in part and dissenting in part). *See also DiFrancesco*, 449 U.S. at 152-54 (Stevens, J., dissenting).

at the request of the defendant.[86] Subsequently, the Court refused to extend *DiFrancesco* to permit the augmentation of a sentence to death following a government appeal.[87] Sentencing in death penalty cases, the Court reasoned, is done by the jury in separate proceedings and is actually more akin to a trial than a typical sentencing.[88] Looking at the chart, it is not difficult to see why government appeals of sentences are allowed. The only value violated when the government takes such appeals is the judicial interest in finality and even that value is not implicated as much as it would be if there were a second trial. Indeed, the Court reasons that government appeals of sentences involve no danger of retrial, less finality than acquittals, and do not place a previously acquitted defendant in the same precarious position as he was during the trial.[89]

English common law notwithstanding, retrials following defendant appeals of convictions have never been prohibited in this country.[90] Similarly, a successful collateral attack on a guilty judgment following a coerced guilty plea does not bar retrial.[91] The Court explained its reasoning in this way:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he was [sic] obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least as doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution.[92]

Additionally, the Supreme Court has also upheld the action of an appellate court in ordering a new trial after a rehearing when that court had originally entered an acquittal.[93]

The only exception to the rule allowing retrial after reversed convictions occurs when the reversal is based on insufficiency of the evidence.[94] If no reasonable jury could convict on the evidence, the Court reasons that an appellate reversal is tantamount to an acquittal, even if the insufficiency of the evidence

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86. *DiFrancesco*, 449 U.S. at 139-43.

87. Bullington v. Missouri, 451 U.S. 430 (1981); *see* O'Hanley, *supra* note 83, at 711.

88. *DiFrancesco*, 449 U.S. at 139-43.

89. *Id.* at 132-36.

90. *See* Forman v. United States, 361 U.S. 416, 425 (1960) (referring to this right as "elementary in our law"); Bryan v. United States, 338 U.S. 552, 560 (1950); Ball v. United States, 163 U.S. 662, 666 (1896); Note, *supra* note 50, at 1283-85.

91. *See* United States v. Tateo, 377 U.S. 463 (1964).

92. *Id.* at 466; *see also DiFrancesco*, 449 U.S. at 131.

93. *Forman*, 361 U.S. at 426.

94. Burks v. United States, 437 U.S. 1, 11 (1978); *see also DiFrancesco*, 449 U.S. at 131.

stems from erroneous exclusions by the trial court judge.[95] However, in *Tibbs v. Florida*,[96] the Court drew a distinction between reversals based upon the sufficiency of the evidence and those based upon the weight of the evidence. In the latter case, a simple disagreement about the proper weight to be assigned to certain evidence is not enough to invoke a double jeopardy bar.[97]

The state of affairs whereby defendants can be retried following reversed convictions must, for purposes of double jeopardy analysis, be compared to a hypothetical situation where appellate reversal would bar retrial. It is clearly possible to prohibit retrials after reversed convictions without denying the defendant the right to appeal at all. When retrials after reversed convictions are permitted, as they are according to current double jeopardy jurisprudence, several of the double jeopardy values are violated. Most importantly, the defendant is subject to a second trial and all the attendant hardships. Indeed, as the Court noted in *Kepner v. United States*,[98] "'[t]he prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.'"[99] Similarly, the judicial interest in finality is wholly violated when the slate is essentially wiped clean and a new trial commences. Again, the possibility of wrongful conviction is enhanced if we compare current doctrine to a state of affairs in which reversed convictions barred retrial. Finally, the defendant's right to have his case completed by the original tribunal is violated, although the defendant is likely to appreciate a new jury rather than the one that originally convicted him. Because the original jury did not acquit the defendant, the jury nullification value is not implicated in the context of defendant appeals.

In the context of multiple trials for similar offenses, the precedents are even more incoherent.[100] According to one commentator, precedent in this area "has led to confusion and inconsistency which has very nearly made the constitutional provision meaningless."[101] Following Westen and Drubel,[102] we can distinguish between "double description" cases and "unit of prosecution." cases. In either context, the test, derived from *Blockburger v. United States*,[103] is whether one offense requires proof of a fact that the other does not.[104] An exception to this

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95. *Burks*, 437 U.S. at 1, 2.

96. 457 U.S. 31, 46-47 (1982); *see also* REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 33.

97. *See* Richardson v. United States, 468 U.S. 317 (1984).

98. 195 U.S. 100 (1904).

99. *Id.* at 129 (quoting Ball v. United States, 163 U.S. 662, 669 (1896)).

100. Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 518 (1975); Note, *supra* note 4, at 344.

101. Note, *supra* note 4, at 368.

102. *See supra* note 26, at 111.

103. 284 U.S. 299, 304 (1932).

104. *See also* Rutledge v. United States, 116 S. Ct. 1241, 1245 (1996); Brown v. Ohio, 432 U.S. 161, 166 (1977); United States v. Dockery, 49 F. Supp. 907, 908 (E.D.N.Y. 1943); McAninch, *supra* note 12, at 447 n.270. Thus, the constitutionality of retrial depends upon the definition of

rule may occur, however, where the State is unable to proceed on the more serious charge at the outset because additional facts have not yet occurred or have not been discovered despite due diligence.[105]

Unit of prosecution cases arise when multiple counts of the same general offense are tried in succession. In *Hoag v. New Jersey*,[106] the Court permitted a defendant who had been acquitted of robbing three people to be reprosecuted for robbing a fourth person even though all four robberies supposedly occurred in the same transaction. Twelve years later the Court held that even though a defendant could be retried under such circumstances, he could rely on collateral estoppel to preclude relitigation of facts previously resolved in his favor.[107] There could be a second trial as long as "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[108]

Double description cases involve offenses which constitute violations of discrete criminal statutes. In determining whether multiple punishment and/or multiple trials are permitted in such cases, the Supreme Court has adopted a rule of lenity.[109] Although the Double Jeopardy Clause does not appear to contain inherent prohibitions on how the legislature may define offenses, the rule of lenity dictates that the Court construe statutory language strictly. Absent clear language to the contrary, the Court will presume that the legislature did not intend to provide for multiple punishments for the same criminal act. In *Sanabria v. United States*,[110] the defendant was charged in one count under both a horse betting theory and a numbers betting theory. The court of appeals held that it had jurisdiction for appeal and that the two theories each constituted separate counts. Therefore, the court could hear the appeal of the numbers betting count from which the defendant had been granted a dismissal. However, the Supreme Court held that "the discrete violations of state law which that business may have committed are not severable in order to avoid the Double Jeopardy Clause's bar on retrials for the 'same offense.'"[111]

The general rule articulated by the Supreme Court is that successive trials of

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the offense in the penal code. *See* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1817-18 (1997).

105. *Brown*, 432 U.S. at 169 n.7; *see also* McAninch, *supra* note 12, at 452 n.305.

106. 356 U.S. 464 (1958); *see also* Note, *supra* note 1, at 280.

107. Ashe v. Swenson, 397 U.S. 436 (1970).

108. *Id.* at 444 (quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38-39 (1960)). Given the possibility of jury nullification, a defendant whose trial is based upon only one factual determination and who was acquitted because the jury chose to nullify could not be retried if a conviction would necessitate relitigation of the same factual determination. This is so even though the jury may have resolved that factual issue against the defendant but elected nonetheless to nullify.

109. *See* Rutledge v. United States, 116 S. Ct. 1241, 1250 (1996); Westen, *supra* note 31, at 1023-33; Westen & Drubel, *supra* note 26, at 116-22.

110. 437 U.S. 54 (1978).

111. *Id.* at 73.

greater and lesser included offenses are prohibited. In *Grady v. Corbin*,[112] the Court devised the "same conduct test" which essentially added a second prong to the original *Blockburger* test. According to the Court in *Grady*, the Double Jeopardy Clause bars retrial "if, to establish an essential element of an offense charged in [the second] prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[113] Three years later the Court rejected the same conduct test as confusing and historically insupportable, and in so doing, explicitly overruled *Grady*.[114] The general rule also applies to cases in which a defendant is convicted of a lesser offense, but the jury remains silent on the greater offense. If the defendant appeals his conviction, he cannot be retried for the greater offense. Jury silence, according to the Court, constitutes an implied acquittal on the greater offense.[115]

In practice, the Supreme Court has taken a somewhat restrictive approach towards double definition cases. In *Brown v. Ohio*,[116] the Court expressed skepticism about prosecutorial attempts to sever the same criminal act into discrete temporal violations. Thus, when a defendant was charged with auto theft and joyriding, which the prosecution argued occurred on different days, Justice Powell wrote that "[t]he Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units."[117] Double definition questions frequently arise under catchall statutes such as RICO and continuing criminal enterprise (CCE) laws. In 1996, the Court held that conspiracy is a lesser included offense of CCE and a trial of the former bars later reprosecution for the latter.[118] However, previous prosecution of a predicate offense other than conspiracy does not bar subsequent prosecution for CCE.[119]

Multiple trials for similar offenses violate every single value embodied by the Double Jeopardy Clause. There is a second trial with all of the accompanying expense, embarrassment, and anxiety for the defendant. The judicial interest in finality is clearly violated by a second trial. Multiple trials also increase the odds

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112. 495 U.S. 508, 521 (1990).

113. *Id.* at 510.

114. United States v. Dixon, 509 U.S. 688, 708-09 (1993); *see also* Rutledge v. United States, 116 S. Ct. 1241, 1245 (1996) (unanimous opinion utilizing original *Blockburger* test); McAninch, *supra* note 12, at 465.

115. Green v. United States, 355 U.S. 184, 189-90 (1957).

116. 432 U.S. 161, 169-70 (1977).

117. *Id.* at 169.

118. *Rutledge*, 116 S. Ct. at 1247. A conviction for engaging in a CCE requires proof of three underlying offenses. A prior trial for conspiracy does not bar retrial for CCE if the conspiracy is not one of the three underlying offenses. In *Jeffers v. United States*, 432 U.S. 137, 152 (1977), the Court reached the same result but permitted retrial because the defendant had specifically opposed the government's efforts to try the cases together. In doing so, the Court seemed to rely once again on the concept of waiver, a formulation which, as we have seen, has been rejected elsewhere. *Id.* at 152-54.

119. Garrett v. United States, 471 U.S. 773, 779 (1985).

of wrongful conviction and the danger that the state will wear down the defendant through repeated prosecutions. A second trial means a second jury, violating the defendant's right to the original tribunal—a particularly significant violation if he was acquitted by the first jury. Finally, multiple trials for similar offenses deprive the defendant of the benefits of jury nullification if the first jury engaged in such a practice. Despite all these violations, the Supreme Court has not held that the Double Jeopardy Clause precludes these multiple trials.

A similar situation arises in the context of concurrent jurisdiction.[120] The same criminal act can be prosecuted by the federal government after a state trial,[121] by the state government after a federal trial,[122] or by the state government after a trial in a different state.[123] This so-called "dual sovereignty doctrine" is precisely what permitted Rodney King's assailants to be reprosecuted in federal court for civil rights violations following acquittals for assault in California state court, even though both charges stemmed from the same alleged criminal act. In *Heath v. Alabama*,[124] the Court permitted one state to retry a defendant and impose the death sentence after he had been tried and sentenced to life imprisonment in another state. Here, too, each and every double jeopardy value is violated; the analysis is exactly the same as in the context of similar offenses. Recognizing this problem, the Model Penal Code severely restricts multiple prosecutions under the dual sovereignty doctrine.[125]

We finally come to the realm of government appeals of acquittals. The state may not appeal acquittals even if the trial was replete with erroneous evidentiary rulings favoring the defendant.[126] In the case that has come to stand for this proposition, *Fong Foo v. United States*,[127] the trial judge dismissed the case based on lack of credibility of the early prosecution witnesses.[128] The trial judge grossly exceeded the scope of his authority in ordering a premature dismissal after hearing only the testimony of preliminary witnesses. Nonetheless, the Court held that the Double Jeopardy Clause barred retrial. The potential for this holding to subvert the ends of justice is reinforced by the exclusionary rule

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120. *See generally* Amar & Marcus, *supra* note 45.

121. Abbate v. United States, 359 U.S. 187, 195 (1959). The "Petite Policy," however, restricts federal trials following state trials to cases which involve compelling federal interests and which have secured the authorization of the Attorney General. McAninch, *supra* note 12, at 426; Poulin, *supra* note 43, at 962 n.32.

122. Bartkus v. Illinois, 359 U.S. 121, 137 (1959); Margaret Jones, *What Constitutes Double Jeopardy?*, 38 J. CRIM. L.C. & P.S. 379, 380 (1947). Such prosecutions may be limited by state law, however. Poulin, *supra* note 43, at 962 n.32.

123. *See* Poulin, *supra* note 43, at 962 n.32.

124. 474 U.S. 82 (1985).

125. MODEL PENAL CODE § 1.10 explanatory note (1985).

126. *See* Sanabria v. United States, 437 U.S. 54, 68-69 (1978); Kepner v. United States, 195 U.S. 100, 131-32 (1904); Ball v. United States, 163 U.S. 662, 671 (1896).

127. 369 U.S. 141 (1962).

128. *Id.* at 141. A dismissal based on factual findings is tantamount to an acquittal under the *Scott* test.

jurisprudence. Illegally obtained evidence or confessions are not admissible. If pivotal evidence is excluded because the trial judge, misapplies the exclusionary rule after jeopardy has attached, there is no recourse. It is difficult to see how such prejudicial error results in any less of a "tainted" trial than does an error which precipitates a mistrial declaration after which the defendant may be retried.[129] In the words of one commentator:

> The more logical view seems to be that the same fundamental principle of justice which allows a re-trial because a juror has been legally disqualified, should allow a re-trial when an error has been committed at the trial, such as, the admission of illegal evidence or the exclusion of legal evidence.[130]

Nevertheless, the Supreme Court has expressed remarkable persistence in its refusal to depart from the double jeopardy values in the context of an acquittal that it so readily discards in the other contexts we have considered.[131]

Doctrinal uncertainty manifests itself in everyday affairs. Appellate dockets lengthen as the government attempts to capitalize on inconsistent precedent. Case by case analysis has particularly bogged down appellate courts in the context of mistrials.[132] The uncertainty also has ramifications for police, attorneys, and judges.[133] When erroneous pro-defendant rulings occur in trials that result in acquittals, the trial judge's decision is insulated from review. His ruling becomes the law in his courtroom and propriety in evidence gathering can hinge upon which judge's name is pulled from the hat. At best, the police are not provided with uniform guidelines; at worst, they are provided with flatly inconsistent judicial directives.

2. Criminals Go Free.—Courts and commentators alike recognize that the values represented by the Double Jeopardy Clause must, to some extent, be balanced against the competing interests of society in seeing the guilty punished

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129. *See, e.g.*, State v. Lee, 30 A. 1110, 1112 (Conn. 1894). Retrial is not permitted even if it can be established that the defendant bribed or intimidated members of the jury.

130. Jones, *supra* note 122, at 388.

131. Federal courts of appeals have quietly endeavored to get around the prohibition on government appeals, however. *See* Scott J. Shapiro, Note, *Reviewing the Unreviewable Judge: Federal Prosecution Appeals of Midtrial Evidentiary Rulings*, 99 YALE L.J. 905, 913-14 (1990). One approach is to require the defendant to waive his double jeopardy rights with respect to a certain evidentiary matter or forego consideration of the motion. The Fifth Circuit legitimized this approach in *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986). A second approach is to declare a mistrial so that the evidentiary matter can be considered in a pre-trial motion. The Fifth Circuit also validated this approach in *United States v. Moon*, 491 F.2d 1047 (5th Cir. 1974). These approaches seem to flatly contradict the values underlying the Double Jeopardy Clause. Furthermore, even if otherwise proper, both approaches require the acquiescence of the trial judge, which may not be forthcoming.

132. Baldasare, *supra* note 27, at 117.

133. Herasimchuk, *supra* note 28, at 242; PRESIDENTIAL COMMITTEE, CHALLENGE OF CRIME IN A FREE SOCIETY 40 (1967).

and ensuring the consistent and efficient administration of the criminal justice system.[134] As Judge Lumbard writes, "I believe that the 'ends of public justice' will not be served if we permit a defendant who is clearly guilty to go free because of the trial judge's erroneous interpretation of the controlling law."[135] To put the point slightly differently, "[w]ithout a method of trapping error, society is cheated out of a just trial."[136]

When the government does not have the right to appeal, the defense has every incentive to attempt to prejudice the jury in his favor.[137] Absent truly aggressive judging, the only remedy is a declaration of a mistrial. Yet, as we have seen, in order for retrial to be permissible after a mistrial declaration to which the defendant does not consent, the state must prove "manifest necessity." This extraordinarily bizarre result unduly handicaps the prosecution in a system which already tips the scales significantly toward the defendant.

When the justice system habitually turns criminals loose because of improper legal rulings by the trial judge, demoralization abounds.[138] One bang of the gavel can wipe away enormous financial and personal investments. A diligent and hardworking prosecutor can lose months of hard work without any fault on his part. This demoralization is not confined to the players in the criminal justice game. Unpunished criminals engender a widespread lack of respect for the criminal justice system among the general public and potential wrongdoers themselves.[139]

3. Perverse Incentives for Trial Judges.—Also to be considered are the effects of the asymmetric right of appeal on the trial judge. Although it is theoretically possible that judges, in order to ensure correctness, might favor the prosecution when ruling on close questions of law to preserve reviewability,[140] it seems far more likely that trial judges will favor defendants to preempt reversal.[141] In a thoughtful and highly provocative article, Kate Stith endeavors

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134. *See* Oregon v. Kennedy, 456 U.S. 667, 672 (1982); United States v. DiFrancesco, 449 U.S. 117, 131 (1980); Illinois v. Somerville, 410 U.S. 458, 464 (1973); United States v. Tateo, 377 U.S. 463, 466 (1964); Downum v. United States, 372 U.S. 734, 743 (1963) (Clark, J., dissenting); Wade v. Hunter, 336 U.S. 684, 688-89 (1949); Gordon, *supra* note 28, at 867; Mayers & Yarbrough, *supra* note 108, at 33; *see also* Baldasare, *supra* note 27, at 108; Note, *supra* note 50, at 1274.

135. United States v. Jenkins, 490 F.2d 868, 884 (2d Cir. 1973) (Lumbard, J., dissenting).

136. Shapiro, *supra* note 131, at 919; *see also* Baldasare, *supra* note 27, at 114-15.

137. If the recent allegations of jury tampering in the O.J. Simpson case prove to be correct, all the sanctions which the legal community can heap upon the defense team will not allow a retrial of Simpson.

138. Miller, *supra* note 12, at 503-04; Shapiro, *supra* note 131, at 907.

139. Herasimchuk, *supra* note 28, at 244; Miller, *supra* note 12, at 504.

140. *See* Mirjan Damaška, *Evidentiary Barrier to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 520 n.22 (1973).

141. Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 37-38 (1990); REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 64; Herasimchuk, *supra* note 28, at 242, 244; Miller, *supra* note 12, at

to demonstrate the effects of asymmetry.[142] She concludes that, except in areas where the law is highly uncertain, trial judges will favor defendants for at least two major reasons. First, judges are not inclined to clutter an already cluttered system. Because the defense can appeal erroneous rulings of law if he is convicted, one way to reduce the number of issues on appeal is to rule close questions in favor of the defense.[143] Second, the perceived magnitude of injustice is greater if an erroneous ruling allows a guilty man to walk than if such a ruling paves the way towards an erroneous conviction.[144] Both points indicate that the defendant benefits from the asymmetry in the right of appeal at the trial level as well.

4. Shifts in the Body of the Law.—Professor Stith also explains how this asymmetry effects evidence law as a whole.[145] When Isaac Newton said that every action has an equal and opposite reaction, he had not considered the world of criminal appeals. There is no countervailing force to oppose the migration of evidence law in a pro-defendant direction.[146] Defense attorneys can and do take frequent appeals which not only lay down the law but also reverse convictions if there are prejudicial errors which favor the government. There are no corresponding appeals for the state. Erroneous pro-defendant rulings are unreversable and, with time, may even gain legitimacy. Furthermore, there will be more erroneous reversals than erroneous affirmations for at least two related reasons. First, appellate judges often view themselves as error seekers—a fact which disinclines them to consistently affirm judgments. The second reason is easier to see in the context of a specific type of ruling. Let us adopt Professor Stith's example of a ruling as to the voluntariness, and hence the admissibility, of a confession. For simplicity sake, we will share her assumption that the ruling on this point is determinative of the outcome of the case. Because defense attorneys are unlikely to take wholly frivolous appeals, the clearly voluntary confessions will not come before the appellate court. Thus, that court might mistake *relative* involuntariness for *actual* involuntariness because of its skewed sample. This phenomenon, too, might lead the appellate court to gradually push evidence law in a direction which favors the defendant.

It may be argued that permitting the government to take advisory appeals would provide an appropriate countervailing force. Although it is true that such appeals would clarify the law and slow the unidirectional drift, it is unlikely that the force would be adequate. Psychologically, there is much more at stake when a reversal of an erroneous conviction will spare a man from a prison term than when a reversal of an erroneous acquittal will merely clarify the law. In any

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142. Stith, *supra* note 141, at 41.

143. *Id.*

144. *Id.*

145. *See also* Miller, *supra* note 12, at 506. The same can be said for the law of criminal procedure.

146. It should be noted that pre-trial motions in limine can be appealed by the prosecution—a phenomenon which provides some force in the other direction. This check, however, is inadequate.

event, the overwhelming majority of states and the federal courts prohibit moot appeals.[147]

5. Potential for Judicial Abuse.—As we have seen, the state may not appeal mid-trial evidentiary rulings. This judicial unreviewability greatly compromises the administration of justice.[148] Judges are free to behave in a lawless manner as long as they do so in a way which furthers the defense. They may bully the prosecution, for example, by forcing the government to begin the trial when key witnesses are absent.[149] There are only two checks on such overt judicial abuse: mandamus from a higher court and impeachment or other disciplinary actions, both of which are utilized only in rare situations.[150]

Although evidentiary rulings are appealable if raised in pre-trial motions, there are at least two reasons why such a provision is inadequate. First, during the course of the trial, innumerable unanticipated questions will emerge regarding, among other things, relevance, prejudice, hearsay, and jury instructions.[151] Second, as noted previously, judges may deliberately delay rulings on pre-trial motions until jeopardy attaches, making the decisions essentially unreviewable.[152] There is an obvious incentive for the defense to withhold its own evidentiary motions, as well as attempt to delay those of the prosecution, until jeopardy attaches.[153]

6. Potential Adverse Effects on Defendant.—Several scholars have speculated that there is a correlation between the asymmetric right of appeal and the lack of an impetus to reform liberal reprosecution rules in the context of similar offenses and, especially, in concurrent jurisdictions.[154] In the words of one commentator:

> There is probably some correlation between the slighting of this interest [the interest of society in preventing the guilty from going unpunished] and the development of rules allowing a liberal splitting of offenses and multijurisdictional prosecutions: when one slip may result in total immunity from prosecution for an offense, the temptation to multiply the

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147. Mills v. Green, 159 U.S. 651, 653 (1895). *Compare* State v. Viers, 469 P.2d 53, 53 (1970) (moot appeals are unconstitutional); State v. Martin, 658 P.2d 1024, 1025 (Kan. 1983) (advisory appeals taken by state are permissible only when they involve questions of statewide interest that are vital to correct and uniform administration of criminal law).

148. *See* Herasimchuk, *supra* note 28, at 244; Miller, *supra* note 12, at 505.

149. Poulin, *supra* note 43, at 956; Shapiro, *supra* note 131, at 905-06.

150. Stith, *supra* note 141, at 37-38.

151. Shapiro, *supra* note 131, at 906.

152. *Id.* at 912-13.

153. Recognizing this problem, the First Circuit made some effort to restrict judges' ability to take this approach. *See* United States v. Barletta, 492 F. Supp. 910, 912-14 (D. Mass. 1980), *cited in* Shapiro, *supra* note 131, at 92-93.

154. *See, e.g.*, Jones, *supra* note 122, at 380; Mayers & Yarbrough, *supra* note 108, at 14; Note, *supra* note 50, at 1274.

number of bites at the apple may become irresistible.[155]

This Article advocates permitting government appeals from criminal acquittals as well as instituting compulsory joinder.[156]

C. Policy Justifications Reconsidered

Now that we have surveyed double jeopardy jurisprudence and the problems caused by the asymmetric right to appeal, it is useful to re-examine the values embodied by the Double Jeopardy Clause. Upon doing so, it will become readily apparent that doctrine has departed from rationale and that each of the double jeopardy values has been discarded when the Supreme Court has deemed it pragmatic to do so. Government appeals from erroneous acquittals do not necessarily violate all these rationales and, even if they do, the corresponding government interest in the fair and efficient administration of criminal justice warrants lifting the prohibition on such appeals.

Justice Cardozo doubted that government appeals of criminal acquittals constituted an impermissible hardship for the defendant. As he wrote in *Palko v. Connecticut*,

> The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. This is not cruelty at all, nor even vexation in any immoderate degree. . . . The edifice of justice stands, its symmetry, to many, greater than before.[157]

Judge Lumbard eloquently reminds us that the defendants' interest in avoiding a second trial must be weighed against the competing interests of the state. He states:

> An unalterable rule that the Double Jeopardy Clause bars all government appeals from acquittals, fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice.[158]

We have witnessed the Supreme Court's willingness to allow the defendant to incur a second trial and all the attendant hardship. Indeed, the chart demonstrates that this value—the most important of those protected by the Double Jeopardy Clause—is all but ignored in the contexts of mistrials granted with the defendant's consent or because of a manifest necessity, dismissals based on nonfactual issues, reversed convictions, similar offenses, and concurrent

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155. Note, *supra* note 50, at 1274.

156. *See infra* text accompanying notes 191-94.

157. 302 U.S. 319, 328 (1932) (internal citations omitted).

158. United States v. Jenkins, 490 F.2d 868, 884 (2d Cir. 1973) (Lumbard, J., dissenting).

jurisdiction.[159] The Court in *Jeffers* openly admitted that "the policy behind the Double Jeopardy Clause does not require prohibition of the second trial."[160] It is profoundly ironic that retrial is permitted after an error-free trial that culminates in a hung jury, but not when prejudice, inserted into the proceedings by a crafty defense lawyer, results in an acquittal.[161] In his dissent in *Scott*, Justice Brennan goes so far as to suggest that the value of protecting the defendant from the hardships of a second trial is not central. He writes, "[w]hile the Double Jeopardy Clause often has the effect of protecting the accused's interest in the finality of particular favorable determinations, this is not its objective. For the Clause often permits Government appeals from final judgments favorable to the accused."[162] Given the willingness of the Court to abandon this value when expediency so requires, it cannot be accorded such sacred status in the context of government appeals of acquittals. At the very least, we should heed Judge Lumbard's advice and weigh this rationale against the importance of a fair and efficient criminal justice system.

The overburdened judiciary certainly has a powerful interest in the finality of verdicts which proceed a fair trial. However, when a trial is marred by legal error, whichever side it favors, the trial is quite simply unfair:

> The end is not reached, the cause is not finished, until both the facts and the law applicable to the facts are finally determined. The principle of finality is essential; but not more essential than the principle of justice. A final settlement is not more vital than a right settlement.[163]

The Supreme Court has shown a readiness to discard this value as well in the contexts of judgments not withstanding the verdict, sentences, reversed convictions, similar offenses, and concurrent jurisdiction.

Both society and individual defendants have a vital interest in ensuring that persons are not wrongfully convicted. State appeals of criminal acquittals would necessitate retrial and any trial brings with it the possibility that the defendant will be wrongfully convicted.[164] The number of wrongful convictions could just as well be reduced by prohibiting the prosecution of every fourth defendant, but no one would seriously entertain such a proposal. An acquittal following a trial marred by significant legal error[165] which favors the defendant does not suggest in any way that the defendant is not guilty. As Justice Brennan wrote, "[t]he rule

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159. *See* United States v. DiFrancesco, 449 U.S. 117, 149 (1980) (Brennan, J., dissenting).

160. Jeffers v. United States, 432 U.S. 137, 152 (1977).

161. Mayers & Yarbrough, *supra* note 108, at 12.

162. United States v. Scott, 437 U.S. 82, 104 (1978); *see also* Westen & Drubel, *supra* note 26, at 125-29.

163. State v. Lee, 30 A. 1110, 1110-11 (Conn. 1894).

164. *See* REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 56.

165. I am not advocating allowing the state to retry defendants whenever it can demonstrate prejudicial error. The concept of "harmless error" should be applied to error which prejudices the state just as it is applied to those errors which prejudice the defendant. Only when the trial judge's error could have had a substantial impact on the verdict should the case be retriable.

prohibiting retrials following acquittals does not and could not rest on a conclusion that the accused was factually innocent in any meaningful sense. If that were the basis for the rule, the decisions that have held that even egregiously erroneous acquittals preclude retrials were erroneous."[166] Moreover, as Justice White opined in *Patterson v. New York*, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."[167] The possibility of a wrongful conviction is also present in the contexts of pre-trial motions, mistrials, dismissals, judgments notwithstanding the verdict, retrials following reversed convictions, similar offenses, and concurrent jurisdiction. Yet the Court has determined that the Double Jeopardy Clause does not bar government appeals in these instances.

The Supreme Court has retreated from a stance that accords significant weight to the accused's right to have his trial completed by the original tribunal. In overruling *Jenkins*, the Court in *Scott* noted that "our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that *Jenkins* was wrongly decided. It placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empaneled to try him . . . ."[168] Elsewhere, the Court acknowledged the need to balance this interest with the competing interests of the state: "'a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.'"[169] If the defendant's right to have his trial completed by the original jury were essential to the double jeopardy guarantee, we could imagine that there would be some distinction between jury verdicts and bench verdicts. Yet this is a distinction the Court has refused to draw. Furthermore, a quick glance at the chart indicates the contexts in which the Court has allowed this value to be superseded. These contexts include mistrials granted with the defendant's consent or because of a manifest necessity, dismissals based on nonfactual issues, reversed convictions, similar offenses, and concurrent jurisdiction.

Professors Westen and Drubel maintain that jury nullification is the only viable rationale behind the Double Jeopardy Clause.[170] A consideration of the propriety of jury nullification is beyond the scope of this article. For our purposes, it is enough to acknowledge that jury nullification is far from an absolute right.[171] In fact, the leading federal decision on jury nullification regards

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166. *Scott*, 437 U.S. at 108 (Brennan, J., dissenting) (citations omitted); *see also* Westen & Drubel, *supra* note 26, at 128.

167. 432 U.S. 197, 208 (1977).

168. *Scott*, 437 U.S. at 86-87.

169. Richardson v. United States, 468 U.S. 317, 324-25 (1984) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)); *see also* Burks v. United States, 437 U.S. 1, 11 n.6 (1978); Arizona v. Washington, 434 U.S. 497, 516 (1978); Illinois v. Somerville, 410 U.S. 458, 470-71 (1973); United States v. Jorn, 400 U.S. 470, 480 (1971).

170. Westen & Drubel, *supra* note 26; *see also* Westen, *supra* note 31.

171. In a recent, highly controversial article, Paul Butler defends jury nullification as a moral good, particularly when practiced by black jurors who sit on cases in which black defendants are

it less as a right than as something we know we cannot prevent. According to *United States v. Dougherty*,[172] the jury has the power to acquit against the evidence but the defendant is not entitled to an instruction advising the jury of that power. Yet the right of jury nullification is implicitly recognized in our criminal justice system. It explains the prohibition on directed verdicts and special verdicts; it explains why the prosecution cannot challenge a verdict for inconsistency; and it explains why the doctrine of collateral estoppel cannot be applied against the defendant in subsequent trials for previously litigated factual disputes.[173]

Allowing government appeals of acquittals would not necessarily eradicate the defendant's "right" to enjoy the benefits of jury nullification. This value can be largely safeguarded by prohibiting government appeals for sufficiency of the evidence, that is, prohibiting retrial or the entering of a guilty judgment when the appellate court determines that no rational jury could have voted to acquit. This approach would not bring about complete symmetry because the defendant could still appeal on the grounds of insufficiency of the evidence (which would bar retrial under *Burks*) or weight of the evidence (which would allow retrial under *Tibbs*).[174] The problem arises when a jury acquits in a case where there has been substantial legal error favoring the defendant. In such cases, there would be no way to ascertain whether the jury might have convicted if erroneously excluded evidence were admitted, or whether they were engaging in jury nullification and would have acquitted regardless of the evidentiary ruling. But we cannot elevate the practice of jury nullification to the status of overt legitimacy—indeed, sacrosanctity—by refusing to retry a defendant whose original trial was tainted with favorable prejudicial errors simply because the jury *might* have acquitted against the evidence.[175]

Again, if jury nullification were truly the rationale behind the double jeopardy guarantee, Double Jeopardy Clause jurisprudence would distinguish

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accused of non-violent crimes. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Yet he candidly admits that his goal is "the subversion of the present criminal justice system." *Id.* at 706 n.158. I share neither his disrespect for the criminal justice system nor his vehement support of the supposed "right" of jury nullification.

172. 473 F.2d 1113, 1136 (D.C. Cir. 1972).

173. *See* Westen, *supra* note 31, at 1012-17; Westen & Drubel, *supra* note 26, at 131-32.

174. *See supra* text accompanying note 94-97.

175. At least one commentator has suggested that this problem can be avoided by using the same jury for the retrial. Amar, *supra* note 104, at 1843. The possibility of utilizing the original jury on retrial to allow them to nullify again if that was, in fact, their original intent, is impractical. Aside from the logistical difficulties in reconvening a dismissed group of citizens, the members of the first jury could hardly be said to be unbiased. They will already have heard any evidence that the appellate court later deemed inadmissible or any instructions that the appellate court later deemed inappropriate. A second jury, of course, would have the power to engage in jury nullification.

between jury trials and bench trials.[176] Furthermore, the chart demonstrates that the value of jury nullification is severely diminished in the contexts of similar offenses and concurrent jurisdiction. In summary, all of the values embodied by the Double Jeopardy Clause are important to the administration of criminal justice. Yet they are not absolutes. The Supreme Court has acknowledged circumstances in which each and every one of these values must take a second seat to the equally fundamental interest of society in convicting the guilty.[177] The prohibition of government appeals of acquittals unduly exalts the interests of the defendant over those of society—and the entire criminal justice system suffers as a result.

III. POTENTIAL OBJECTIONS TO ALLOWING THE STATE TO APPEAL ERRONEOUS ACQUITTALS

This paper has argued that the government should be able to take appeals from acquittals if the trial was tainted with error prejudicial to the state. In the first half of this century, the American Law Institute took a similar view.[178] In order to limit the potential for prosecutorial abuse, appeals should be prohibited in cases where the prosecutor has engaged in misconduct designed to provoke a mistrial or inserted appealable error into the proceedings to avoid an unfavorable verdict. This determination should be made by the trial judge subject to appellate

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176. Poulin, *supra* note 43, at 968; Westen, *supra* note 31, at 1019-21; Westen & Drubel, *supra* note 26, at 132-34. Some commentators, however, defend a corresponding "judge nullification." *See* Poulin, *supra* note 43, at 977 (citing Westen & Drubel, *supra* note 26, at 133).

177. *See supra* text accompanying notes 157-76. It should be noted that retrial is allowed in civil cases when the trial is tainted with legal error prejudicial to the plaintiff. There, too, defendants must face the expense, anxiety, and harassment of a second trial—a trial whose attorney fees need not be borne by the state, even when the defendant is indigent. Similarly, the possibility of wrongful judgment favoring the plaintiff is increased. Finally, the case is not completed by the first tribunal. Obviously, the stakes are lower when the defendant does not face a jail term and no one seriously contends that the Double Jeopardy Clause applies to civil trials. The point is that the values theoretically embraced by the Double Jeopardy Clause are wholly disregarded in the context of civil trials—often no less of an ordeal for the defendant. This phenomenon is even more remarkable when one considers the fact that the competing interest of the state in ensuring a just settlement of a dispute between private parties pales before its competing interest in ensuring that those who violate its laws are convicted.

Moreover, civil tort actions for wrongful death or battery do not violate the Double Jeopardy Clause when they follow criminal acquittals on charges of murder and assault respectively—a fact which allowed private suits against O.J. Simpson and Bernard Goetz. The civil standard of proof which is "by a preponderance of the evidence," is, of course, a lesser standard than proof "beyond a reasonable doubt," which is the standard required in criminal cases. Nonetheless, each and every one of the double jeopardy values is violated when the defendant must undergo virtually identical proceedings after he has been acquitted, though the stakes are arguably less significant.

178. SIGLER, *supra* note 2, § 13; *see also* ORFIELD, *supra* note 2, at 61; REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 54.

review. The possibility of government appeal will significantly reduce the incentives of defense counsel to engage in suspect practices. According to a report to the Attorney General from the Office of Legal Policy of the Department of Justice,

> [t]he possibility of a government appeal on the ground of error would, however, diminish defendants' incentive to interject legal and factual errors into trial proceedings, in the hope of securing unjustified acquittals. It is an unfortunate fact that criminal defense lawyers have too often secured acquittals for their culpable clients through tactics that undermine the search for truth and justice.[179]

Greater symmetry would also eliminate the perverse incentives of trial judges to rule in favor of the defendant on close legal questions to avoid review and retard the movement of evidence in a pro-defendant direction.

Despite the attractiveness of such a policy, there are several potential objections. First and foremost, opponents would argue that government appeals of criminal acquittals violate the constitution. Although that is certainly the case according to current Double Jeopardy Clause jurisprudence, it is far from clear that the founders felt that way.[180] As late as 1937, the Supreme Court placed the double jeopardy guarantee alongside the group of rights that "are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[181] It was not until *Benton* that the Double Jeopardy Clause attained the status of "fundamental."[182]

One theory that has been offered to explain why the Double Jeopardy Clause does not prohibit government appeals of acquittals is Justice Holmes' concept of "continuing jeopardy." As he wrote in his famous dissent in *Kepner*:

> The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. . . . He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm.[183]

Although a majority of the court has never accepted the concept of "continuing

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179. REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 57.

180. *Id.* at 20; *see* Note, *supra* note 4, at 1.

181. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (internal quotes and citations omitted).

182. Benton v. Maryland, 395 U.S. 784, 794 (1969).

183. Kepner v. United States, 195 U.S. 100, 134-35 (1904); Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 309-11 (1984) (Holmes, J., dissenting); Burks v. United States, 437 U.S. 1, 15 n.9 (1978); Jeffers v. United States, 432 U.S. 137, 152 (1977); Amar, *supra* note 104, at 1842-45; ORFIELD, *supra* note 2, at 59-60; Jones, *supra* note 122, at 389; Mayers & Yarbrough, *supra* note 108, at 7-8; McAninch, *supra* note 12, at 6.

jeopardy,"[184] the Court relied on the fact that original jeopardy never terminated in *Richardson v. United States*.[185]

Another theory which holds that government appeals do not violate the Double Jeopardy Clause relies on the fact that a criminal defendant is never put in jeopardy in a trial tainted with error which prejudices the state: "the 'putting in jeopardy' means a jeopardy which is real, and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure."[186] Recently, English courts have held that the English counterpart of the Double Jeopardy Clause is not violated when a retrial follows a trial that was so flawed that it was not really a trial at all.[187]

Assuming, *arguendo*, that government appeals of acquittals do violate the Constitution, the analysis here does not change. This paper seeks to examine the policy considerations surrounding asymmetric appeals. If implementation of the proposal herein recommended would necessitate a constitutional amendment, then that is precisely what sound policy requires.

Opponents may also point to the fact that government appeals of acquittals potentially could involve additional hardship for the innocent. To begin with, the availability of government appeal does not mean that appeals will be taken with any regularity.[188] As one commentator noted, the "main object of that officer is to get rid of his cases as quickly, albeit as gracefully as possible."[189] Furthermore, priority docketing of criminal appeals can help minimize this hardship. Finally, as we saw above, reluctance to impose compulsory joinder of similar offenses may be linked to negative sentiment concerning the prohibition

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184. *See, e.g.*, United States v. Jenkins, 420 U.S. 358, 369 (1975); Green v. United States, 355 U.S. 184, 193 (1957).

185. Richardson v. United States, 468 U.S. 317, 325-26 (1984); *id.* at 327 (Brennan, J., concurring in part and dissenting in part). According to Mayers and Yarbrough, the Court relied upon the concept of continuing jeopardy in *Palko*. Mayers & Yarbrough, *supra* note 108, at 11-12.

186. State v. Lee, 30 A. 1110, 1111 (Conn. 1894); *see also* ORFIELD, *supra* note 2, at 69.

187. Regina v. Dorking Justices, 3 W.L.R. 142 (1984), *cited in* REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 51. In fact, most other common law countries, including New Zealand, India, Ceylon, South Africa, some Australian states, and Canada, permit government appeal of acquittals. REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 50-53. Government appeal is also permitted in most civil law countries, including Japan which has a Double Jeopardy Clause of its own. *Id.* at 2, 53. Finally, such appeals are usually permitted on the Continent, especially in Germany which has very liberal appellate review for both sides. *See* John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, AM. B. FOUND. RES. J. 195 (1981).

188. One way in which we can reduce the capacity for governmental abuse is to adopt a deferential standard such that retrials would be permitted only when the acquittal represented a misapplication of the law *and* that there is a reasonable probability that the outcome was affected by the error. *See* Amar, *supra* note 104, at 1843. This standard would be similar to the Court's deferential test for ineffective assistance of counsel. *See* Strickland v. Washington, 466 U.S. 668, 687, 694 (1984).

189. Miller, *supra* note 12, at 500.

of government appeals.[190] Compulsory joinder has been advocated by judge and commentator alike.[191] The Model Penal Code provides for compulsory joinder.[192] Two commentators suggest that *Brown v. Ohio* was a significant step in that direction.[193] Paradoxically, then, permitting government appeal of erroneous acquittals might decrease the potential for abuse.

There are at least two additional objections to permitting government appeal of acquittals. First, allowing such appeals could only add to the costs of the criminal justice system both in terms of judicial resources and state expenditures for defense counsel for indigent defendants.[194] But at the risk of sounding melodramatic, justice is priceless. If we can improve the fairness of the administration of criminal justice and protect the interest of the state in punishing the guilty, we should be willing to bear the additional burden.[195] Second, opponents may argue that allowing government appeals from acquittals may prompt prosecutors to attempt to use initial trials as discovery devices. As Justice Blackmun opined in *DiFrancesco*, "if the government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own."[196] The simple answer to this concern is to foreclose government appeal when the prosecutor has deliberately inserted error. This prohibition is akin to the current prohibition of retrials after the prosecutor intentionally goads the defendant into moving for mistrial.[197] In short, none of these concerns warrant perpetuation of the asymmetric right to appeal and the plethora of problems which accompany it.

CONCLUSION

Double Jeopardy Clause jurisprudence is riddled with inconsistency. Skillful defense attorneys can exploit the asymmetry in criminal appeals to their culpable clients' interests. A rule that consistently requires criminal defendants to be set free after erroneous legal rulings by trial judges breeds demoralization and cynicism among players and disrespect among laymen. At the trial level, judges have an incentive to favor the defendant in close legal determinations in order to insulate themselves from appellate review—a phenomenon which contributes to

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190. *See supra* text accompanying notes 148-50.

191. *See* Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennen, J., concurring); *see also* Note, *supra* note 1, at 269, 292-96.

192. MODEL PENAL CODE § 1.08 (1985).

193. Westen & Drubel, *supra* note 26, at 162.

194. *See* Herasimchuk, *supra* note 28, at 244.

195. It should be recalled that crime, particularly white collar crime, has enormous economic costs. If more criminals were brought to justice, not only could the state reclaim some of this loss, but the deterrent effect of punishment on would-be criminals would increase in a commensurate fashion.

196. United States v. DiFrancesco, 449 U.S. 117, 128 (1980); *see supra* text accompanying notes 28-29; *see also* Gordon, *supra* note 28, at 856-66.

197. *See* Westen, *supra* note 31, at 1006.

the subversion of justice. The unreviewable trial judge dictates the law in his courtroom—a fact which has profound effects on the way evidence is gathered during criminal investigations. The asymmetric right of appeal gradually pushes the body of evidence law farther and farther towards the interests of the defendant and farther and farther away from the interests of society.

The values represented in the Double Jeopardy Clause are essential to our system of justice, but they are not absolutes. The Court has balanced and should continue to balance these values against the competing interest of society in maintaining a fair justice system that maximizes correct results while still protecting the rights of the defendant. In a system that already stacks the deck in favor of the defendant, it is unnecessary and unwise to deny the government the right to take appeals when criminal trials are tainted by erroneous legal determinations.

Appendix—The Chart

VALUE

CONTEXT	Ordeal for Plaintiff	Finality with respect to Courts	Poss. of Wrongful Conviction	Same Tribunal	Jury Nullification	Double Jeopardy Bar?
Pre-trial Motions	NV	NV	****	NV	NV	NO
Mistrials With Def. Consent	Depends	NV	****	****	NV	NO
Without Consent	Depends	NV	****	****	NV	YES
Dismissals Factual	Depends	NV	****	****	NV	YES
Non-Factual	Depends	NV	****	****	NV	NO
Jnovs	NV	****	****	NV	NV	NO
Sentences	NV	****	NV	NV	NV	NO
Def. Appeals	****	****	****	****	NV	NO
Similar Offenses	****	****	****	****	****	NO
Concurrent Jurisdiction	****	****	****	****	****	NO
Acquittals	****	****	****	****	****	YES

Key:

**** = the value represented by this cell would be violated if there were no double jeopardy bar

NV = the value represented by this cell would **not** be violated if there were no double jeopardy bar

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NOTES

ANALYZING MINIMUM CONTACTS THROUGH THE INTERNET: SHOULD THE WORLD WIDE WEB MEAN WORLD WIDE JURISDICTION?

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INTRODUCTION

In the first 1996 Presidential debate, Senator Bob Dole directed his closing remarks to the youth of America. Given President Bill Clinton's lead in the polls, Senator Dole needed to make a big impact in the debate. So, what did he say to inspire America's young voters? "I ask for your support. I ask for your help. If you really want to get involved, just tap into my homepage—www.dolekemp.org."[1]

It seems that everyone, from would-be Presidents to household pets,[2] has a "Web page." Although the Internet began as a government research project, Senator Dole's closing remark illustrates the significant force it has today as a communication medium.[3] Use of the Internet has permeated to virtually all aspects of our culture.[4] Consistent with its origin, government and educational

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1. Senator Robert Dole, Presidential Debate, Hartford, Conn. (Oct. 6, 1996).

2. *See, e.g., Pets in the Whitehouse* (visited Feb. 17, 1998) <http://www.whitehouse.gov/WH/kids/html/pets.html> (the official Web page of Socks the cat as well as other pets that have occupied the Whitehouse).

3. Although Dole's Web site was not enough to turn the election around, it was enough to generate interest among the voters. Dole's Web site received 762,000 visits in a single four hour period the day after the debate. Press Release, 1996 Presidential Campaign Press Materials (October 7, 1996).

4. Consider the following passage from a report issued by President Clinton's Information Infrastructure Task Force:

> The Global Information Infrastructure (GII), still in the early stages of its development, is already transforming our world. Over the next decade, advances on the GII will affect almost every aspect of daily life—education, health care, work, and leisure activities. Disparate populations, once separated by distance and time, will experience these changes as part of a global community.

use of the Internet remains substantial.[5] Additionally, however, individuals are now making use of the Internet in practically every way imaginable.[6] Further, commercial use of the Internet is rapidly expanding and will likely become a significant part of the economy.[7]

The Internet has greatly enhanced our ability to interact with people and organizations in other states as well as internationally.[8] As a result of the various services available through the Internet, individuals and organizations are now able to disseminate a variety of information to a worldwide audience with relative ease and little cost. It was not until recently, however, that the Internet's seemingly limitless boundaries collided with our legal system's jurisdictional boundaries. There has been a flurry of recent cases where Internet users have asserted that they were not amenable to personal jurisdiction in the forum where they were sued, despite the fact their Internet activities allegedly had caused

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> No single force embodies our electronic transformation more than the evolving medium known as the Internet. Once a tool reserved for scientific and academic exchange, the Internet has emerged as an appliance of every day life, accessible from almost every point on the planet. Students across the world are discovering vast treasure troves of data via the World Wide Web. Doctors are utilizing tele-medicine to administer off-site diagnoses to patients in need. Citizens of many nations are finding additional outlets for personal and political expression. The Internet is being used to reinvent government and reshape our lives and our communities in the process.

William J. Clinton & Albert Gore, Jr., *A Framework for Global Electronic Commerce* (July 1, 1997) <http://www.iitf.nist.gov/eleccomm/ecomm.htm> (endnotes omitted).

5. *See, e.g.*, *Yahoo!—Government* (visited Feb. 17, 1998) <http://www.yahoo.com/government/> (a directory of government resources available on the Internet's World Wide Web); *Yahoo!—Education* (visited Feb. 17, 1998) <http://www.yahoo.com/education/> (a directory of educational resources available on the Internet's World Wide Web).

6. Indeed, as stated in *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997), "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought." In *Reno*, the court was faced with deciding the constitutionality of several provisions of the Communications Decency Act of 1996, 47 U.S.C. § 223, that sought to regulate much of the content on the Internet. *Id.* at 828-30. The court in *Reno* made extensive findings of fact which provide a comprehensive description of the Internet. *See id.* at 830-49.

7. *See* Clinton & Gore, *supra* note 4, stating:

> World trade involving computer software, entertainment products (motion pictures, videos, games, sound recordings), information services (databases, online newspapers), technical information, product licenses, financial services, and professional services (businesses and technical consulting, accounting, architectural design, legal advice, travel services, etc.) has grown rapidly in the past decade, now accounting for well over $40 billion of U.S. exports alone.
>
> An increasing share of these transactions occurs online. The GII has the potential to revolutionize commerce in these and other areas by dramatically lowering transaction costs and facilitating new types of commercial transactions.

8. *See supra* note 4.

harm in that forum.[9]

This Note will discuss a court's power to assert personal jurisdiction over a nonresident defendant based on that defendant's Internet activities. Part I will provide an overview of the Internet and suggest that an understanding of its true nature is critical to proper application of legal precedent to cases involving Internet use. Part II will describe the minimum contacts test that provides an analytical framework used to determine whether the assertion of personal jurisdiction over a nonresident defendant meets the constitutional requirements of due process. Part III will critically examine various approaches that have been used to analyze a nonresident's forum contacts through the Internet. Part IV will briefly discuss the fairness requirements of due process analysis in the context of cases involving the Internet. This Note will conclude by arguing that certain adaptions of the minimum contacts test are capable of fairly and efficiently handling personal jurisdiction questions arising out of Internet related activities. Due process demands, however, that a court clearly focus on the nonresident defendant's Internet activities giving rise to the action, rather than the global nature of the Internet itself.

I. THE INTERNET

The Internet defies definition. In a technical and physical sense, it is simply a computer network, albeit a very large one.[10] What many have come to think of as the Internet, however, goes well beyond the computers and communication lines that connect them. It has been analogized to a highway,[11] and the term "cyberspace" implies a separate universe apart from the physical world.[12] These

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9. *See infra* notes 104-211 and accompanying text.

10. As described in *Reno*:

> 1. The Internet . . . is a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks. This is best understood if one considers what a linked group of computers -- referred to here as a 'network' -- is, and what it does. Small networks are now ubiquitous (and are often called 'local area networks'). For example, in many United States Courthouses, computers are linked to each other for the purpose of exchanging files and messages (and to share equipment such as printers). These are networks.
>
> 2. Some networks are 'closed' networks, not linked to other computers or networks. Many networks, however, are connected to other networks, which are in turn connected to other networks in a manner which permits each computer in any network to communicate with computers on any other network in the system. This global Web of linked networks and computers is referred to as the Internet.

Reno, 929 F. Supp. at 830-31.

11. Quite often the Internet and other advancing communications mediums are referred to collectively as the "information superhighway." *See, e.g.*, R. Scot Grierson, *State Taxation of the Information Superhighway: A Proposal for Taxation of Information Services*, 16 LOY. L.A. ENT. L.J. 603 (1996).

12. *See, e.g.*, William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World*

analogies and characterizations, however, fail to capture the true essence of the Internet and actually frustrate an attempt to gain an understanding of it. In analyzing personal jurisdiction questions, notions that accentuate the boundless nature of the Internet have already resulted in the focus being shifted away from the activities of the defendant giving rise to the action to the global nature of the Internet.[13]

The Internet began in 1969 as a government funded project of the Advanced Research Project Agency ("ARPA") to facilitate the sharing of information among government and educational researchers, primarily those involved with the Department of Defense.[14] Originally the network was known as the ARPANET.[15] Over time, access to the ARPANET was expanded to additional universities, corporations, and finally, to people around the world to become what is now known as the Internet.[16] In 1996, it was estimated that as many as forty million people were accessing the Internet, and it was forecasted that the number of Internet users would grow to 200 million by 1999.[17]

Although electronic mail ("e-mail"),[18] newsgroups,[19] and listservs[20] are popular features of the Internet, the driving force behind the increased popularity and explosive growth of the Internet is clearly the World Wide Web ("Web").[21]

Precedent to the Virtual Community, 30 WAKE FOREST L. REV. 197 (1995) (arguing that the users of the Internet and other advanced networked communication mediums form 'virtual communities' to which existing law is not well-suited).

13. *See infra* notes 129-59 and accompanying text.

14. *Reno*, 929 F. Supp. at 831.

15. *Id.*

16. *Id.* For purposes of this Note, other proprietary networks that are not fully open to Internet users, such as Compuserve or America Online, are also considered to be part of the Internet. These proprietary networks charge subscribers a monthly fee for access to their system in return for access to a number of information services, as well as general Internet access. *See id.* at 833.

17. *Id.* at 831. For a description of the ways in which individuals gain access to the Internet, see *id.* at 832-34.

18. For a description of the use of e-mail through the Internet, see *id.* at 834.

19. A newsgroup allows a group of individuals to carry on an electronic discussion covering a topic of common interest to the group. Individuals can access the newsgroup and see the messages that have been placed on it. Individuals can also place messages on the newsgroup for others to view. *See id.* at 834-35.

20. A listserv is an e-mail address that reroutes messages to a predefined list of other e-mail addresses. Through a listserv, an Internet user can send a message to a listserv address to reach a large number of people. Conversely, Internet users that subscribe to a listserv will receive all messages sent to the listserv address. Typically, listservs operate like newsgroups allowing multiple users, who share a common interest, to carry on electronic discussions in a group setting. *See id.* at 834. Internet Relay Chat ("IRC") is another popular form of communication conducted primarily as a leisure activity through the Internet. Through IRC, individuals can communicate in real time in a one to one or group setting. *See id.* at 835.

21. *Id.* at 836-38.

Prior to the advent of the Web, finding information on the Internet could be an arduous task.[22] A Web "page" is a file stored on the Internet that may contain text, sound, pictures, and even full motion video. As a result of the Web's multimedia[23] capabilities, graphical point and click interface, and the seamless connectivity of Web pages, traversing the Web[24] is rapidly becoming one of the country's favorite pastimes.

The increasing popularity of the Internet has not escaped the attention of commercial enterprises. Small businesses now have the ability to reach far beyond the local markets they have served in the past.[25] In many cases, however, these businesses may simply be using the technology of the Internet to better serve local markets and may have no intention of expanding beyond intrastate business.[26] Nevertheless, a small business that posts a Web site to solicit a local market may be called on by a distant patron as a result of its "nationwide advertising campaign."[27] Similarly, a local entrepreneur who advertises her latest business venture on the Internet may unknowingly be infringing the trademark of a large corporation headquartered on the other side of the country.[28] When disputes arise out of situations such as these, it will be fundamental to the due process inquiry that a court make a serious effort to understand not only the technology of the Internet, but more importantly how the individual or business being accused of causing harm was using that technology.

II. THE MINIMUM CONTACTS TEST

Since *Pennoyer v. Neff*,[29] the Supreme Court has struggled with adapting the requirements of the Due Process Clause of the Fourteenth Amendment[30] to the

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22. *See id.* at 838.

23. The combination of text, sound, pictures, and full motion video in a computer product is often referred to as multimedia.

24. For a description of how users navigate the Web, see *Reno*, 929 F. Supp. at 836-37.

25. *See supra* note 7.

26. *See* Frank Houston, *Going Local Online, the Big Fish Vie for the Cities*, COLUM. JOURNALISM REV., Nov.-Dec. 1996, at 11 (stating that, "[m]any . . . major players are betting that, as Internet usage increases, local markets, with their lucrative classified and local retail advertising, will be the real cash cows on the Web."). *See, e.g.*, *Yellowpages.com* (visited Feb. 17, 1998) <http://www.yellowpages.com> (advertising directory searchable by city); *Welcome to Sidewalk* (visited Feb. 17, 1998) <http://www.sidewalk.com> ("city guide to entertainment" developed by Microsoft).

27. *Cf.* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (characterizing advertising via a Web page as a substantial nationwide advertising campaign).

28. *Cf.* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996) (dismissing for lack of personal jurisdiction action alleging defendant's Web site constituted trademark infringement), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

29. 95 U.S. 714 (1877).

30. The Fourteenth Amendment to the Constitution provides in part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST.

increased mobility of society and globalization of commerce.[31] In 1945, the Supreme Court abandoned the inflexible requirement of presence established in *Pennoyer*,[32] and the legal fictions that had been created to accommodate it,[33] in favor of a more flexible standard for determining the limitations the Due Process Clause places on a state's power to assert jurisdiction over those outside its borders. In *International Shoe Co. v. Washington*,[34] the Court created the "minimum contacts test" by stating

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.[35]

Applying the minimum contacts test proved more difficult than stating it, however, and the Court has since decided a number of cases applying the test to a variety of fact patterns.[36] From these cases, additional principles and approaches have been derived from the basic framework laid out in *International Shoe*.[37] An understanding of these cases is critical to a properly focused due process inquiry in any context.

Ultimately, the test that has evolved from *International Shoe* is a two step analysis.[38] The first step analyzes the defendant's contacts with the forum

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amend. XIV, § 1.

31. *See generally* ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 2.02 (2d ed. 1990); Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984).

32. *Pennoyer* basically established two propositions in its interpretation of the recently enacted Fourteenth Amendment. First, states possessed constitutional authority to assert jurisdiction over all persons and things present within their borders. 95 U.S. at 734. Second, states lacked constitutional authority to assert jurisdiction over persons and things not present within their borders. *Id.* at 731.

33. *See, e.g.*, Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264 (1917) (holding that a foreign corporation doing business in forum State could be deemed "present" in that state and amenable to personal jurisdiction under *Pennoyer*); Hess v. Pawloski, 274 U.S. 352 (1927) (upholding jurisdiction based on legal fiction that out-of-state motorist had, by using the highways of forum State, consented to jurisdiction and appointed a designated state official to accept process).

34. 326 U.S. 310 (1945).

35. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (other citations omitted).

36. *See infra* notes 50-102 and accompanying text.

37. *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.10 (2d ed. 1990); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599 (1993).

38. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980). The court must also have a statutory basis for asserting jurisdiction. There are basically two types of statutes that give state courts authority to serve process upon nonresidents. Some states provide enumerated acts which, if committed by a nonresident, give the states such authority. *See, e.g.*, IND. R. CIV. P.

asserting jurisdiction.[39] If it is not established that the defendant has sufficient contacts with the forum, the second step will not even be considered and the defendant will not be amenable to jurisdiction in the forum.[40] Conversely, if sufficient contacts between the defendant and the forum are established, a court will move to the second step and inquire whether forcing the defendant to defend in the forum meets the fairness requirements of *International Shoe*.[41] Once contacts are deemed sufficient, however, the burden is on the defendant who "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[42] Defendants have rarely prevailed on the fairness step once sufficient contacts were established.[43]

A. Analyzing Contacts

Commentators have offered various theories to explain the requirement that a nonresident have contacts with the forum before jurisdiction can be asserted.[44] Yet, while the purpose underlying the rule is arguably unclear, the Supreme Court's recurring theme has been that it must be foreseeable to the defendant that, as a result of his "conduct and connection with the forum State," he could be "haled into court there."[45] The Court has repeatedly emphasized that there must be some act by which the defendant has purposefully directed his activities

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4.4(A). Other states extend the authority of the courts to the limits of due process. *See, e.g.*, ARIZ. R. CIV. P. 4.2(a). Additionally, federal courts are generally constrained by the long arm statutes of the state in which they sit. *See generally* FRIEDENTHAL, *supra* note 37, § 3.12.

39. *See infra* notes 44-96 and accompanying text.

40. *World-Wide Volkswagen*, 444 U.S. at 294. *But see* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (indicating that a lesser showing of contacts may be required if the fairness issues strongly favor the assertion of jurisdiction). Most courts have followed the approach from *World-Wide Volkswagen* and employ a bifurcated approach with a threshold requirement of sufficient contacts. *See* FRIEDENTHAL, *supra* note 37, §3.10, at 122 n.9.

41. *Burger King*, 471 U.S. at 477.

42. *Id.*

43. *See, e.g., id.*; Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984). *But see* Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102 (1987) (holding that jurisdiction over Japanese defendant was constitutionally unreasonable when forum State had weak interest in maintenance of suit despite finding that defendant had sufficient contacts).

44. *Compare* Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 534 (1991) (arguing that personal jurisdiction in general is simply "a doctrine to limit a plaintiff's choices of possible fora.") *with* Richman, *supra* note 37, at 613 (suggesting that "the contacts requirement is simply a vestige of the Court's territorial power theory and has no modern, functional justification."). *See also* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 24-25 (1990) (stating "the interests that jurisdictional due process supposedly serves can be illusory, not within the clause's sphere of protection, or not actually served by limiting state court assertions of personal jurisdiction.").

45. *World-Wide Volkswagen*, 444 U.S. at 297.

at the forum State.[46] Further, the Court has stated that a principal purpose of the Due Process Clause is to allow "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[47]

The contacts question can be examined more directly in some cases, such as situations where the nonresident allegedly is doing business in the forum State or cases involving contract disputes between parties of different states.[48] In other cases, however, searching for the requisite purposeful direction can be more elusive and additional theories and tests have been established to focus the contacts inquiry.[49]

1. Doing Business and Contractual Relations.—If a nonresident business organization has substantial connections with the forum State, it may be amenable to jurisdiction for any cause of action regardless of whether it arises out of the contacts with the forum State.[50] This is referred to as general jurisdiction. In most cases, however, a nonresident will only be amenable to jurisdiction if the cause of action arises out of the forum contacts used to satisfy the minimum contacts test.[51] This is referred to as specific jurisdiction.[52]

In determining when a nonresident's business contacts with the forum State are sufficient to satisfy due process, the Court has often looked to whether the activities were "continuous and systematic."[53] The activities will have to be very substantial to render a nonresident defendant amenable to general jurisdiction.[54] Additionally, purchases made in the forum, standing alone, will almost certainly

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46. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 252 (1958); *World-Wide Volkswagen*, 444 U.S. at 297; *Burger King*, 471 U.S. at 472-74.

47. *World-Wide Volkswagen*, 444 U.S. at 297.

48. *See infra* notes 50-76 and accompanying text.

49. *See infra* notes 77-96 and accompanying text.

50. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). Additionally, "domicile . . . for a natural person, and incorporation within the state . . . for a corporation" will be sufficient to render a defendant amenable to jurisdiction for any cause of action. Richman, *supra* note 37, at 616.

51. *See generally* Richman, *supra* note 37, at 617-18.

52. Consistent with the minimum contacts test in general, there are no bright line rules distinguishing specific and general jurisdiction. *See id.* at 615.

53. *See* International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945); *Perkins*, 342 U.S. at 445; Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984). The consideration of whether the defendant's activities in the forum were "continuous and systematic" is a required element of the minimum contacts test for general jurisdiction. The threshold question, therefore, is whether the cause of action arises out of the defendant's forum related activities. *See Perkins*, 342 U.S. at 445-46.

54. *See Hall*, 466 U.S. at 408 (holding that travel to and purchases in the forum State, along with checks drawn on a forum State bank, were not sufficient for jurisdiction); Richman, *supra* note 37, at 616. *But see Perkins*, 342 U.S. at 448 (holding that the forum State may "take or decline jurisdiction" based on corporation's forum activities that were unrelated to the claim).

not result in general jurisdiction, no matter how substantial.[55]

If the cause of action arises out of the forum related contacts, such that specific jurisdiction is being asserted, a lesser showing of continuous and systematic activities is required.[56] Moreover, in specific jurisdiction cases, the substance of the defendant's forum related conduct may be sufficient to satisfy due process, even if the activities were not continuous and systematic.[57] If a defendant has incurred substantial obligations in the forum, claims arising out of those obligations will likely result in jurisdiction.[58] In *McGee v. International Life Insurance Co.*,[59] for example, the Supreme Court held that even entering into a single contract to insure a resident inside the forum State was a sufficient contact to satisfy the minimum contacts test.[60]

If, however, the defendant did not affirmatively choose to do business in the forum, the result may be different. In *Hanson v. Denckla*,[61] Florida attempted to assert jurisdiction over a Delaware trust company. The Delaware company was the trustee of a trust established by a Pennsylvania resident who later moved to Florida.[62] The trust company maintained its relationship with the settlor after she moved to Florida.[63] The plaintiff had relied heavily on *McGee* in arguing that the trust company's business dealings with a Florida resident were sufficient contacts to satisfy due process.[64] The Court distinguished *McGee* by pointing out that the trust was initially established in Pennsylvania, not Florida.[65] In contrast, the defendant in *McGee* had affirmatively solicited business in the forum State.[66] Specifically, the Court stated:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the

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55. *Hall*, 466 U.S. at 417 (citing Rosenberg Bros. v. Curtis Brown Co., 260 U.S. 516 (1923)).

56. FRIEDENTHAL ET AL., *supra* note 37, § 3.10; Richman, *supra* note 37, at 614. The focus of this Note is on the assertion of jurisdiction over a nonresident defendant based on that defendant's Internet activities where the cause of action arises out of those Internet activities. The discussion, therefore, will concentrate on the application of the minimum contacts test in the context of specific jurisdiction cases.

57. FRIEDENTHAL ET AL., *supra* note 37, § 3.10.

58. *Id.*

59. 355 U.S. 220 (1957).

60. *Id.* at 222-23.

61. 357 U.S. 235 (1958).

62. *Id.* at 238.

63. *Id.* at 252.

64. *Id.* at 250.

65. *Id.* at 251-52.

66. *Id.* at 251.

privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[67]

The single contract issue was eventually revisited in *Burger King Corp. v. Rudzewicz*,[68] and given the apparent conflict between *McGee* and *Hanson*,[69] the Court provided much needed guidance as to when contractual relations are sufficient contacts to give rise to jurisdiction. *Burger King* involved a suit filed in Florida by Burger King Corp. ("Burger King"), a Florida corporation, against one of its franchisees who was a resident of Michigan.[70] The Court began by emphasizing that a state "may exercise personal jurisdiction over a nonresident who purposefully directs his activities toward forum residents."[71] Further, the Court stated that "where the defendant . . . has created 'continuing obligations' between himself and residents of the forum, . . . it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well."[72]

The Court then proceeded to apply these principles to the question of whether a single contract was a sufficient contact to render the defendant amenable to personal jurisdiction in the forum. First, the Court declared that a contract with a party in the forum State does not automatically render the nonresident amenable to jurisdiction.[73] Next, the Court enumerated the factors to be considered in a contract case to make the contacts determination. Those factors are: (1) the prior negotiations, (2) contemplated future consequences, (3) the terms of the contract, and (4) the parties' actual course of dealing.[74] Finally, the Court concluded that it was reasonably foreseeable to the defendant that the contract could result in litigation in Florida.[75] In reaching this conclusion, the Court emphasized the long term nature of the contract, the defendant's dealings with Burger King's Florida offices, and the fact that the contract had a Florida choice of law provision.[76]

2. Stream of Commerce Theory.—The stream of commerce theory has been employed in contacts analysis primarily in products liability actions where a product manufactured or sold outside the forum State has caused injury in the forum State. The stream of commerce theory was first invoked by the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*.[77] In *World-Wide Volkswagen*, the plaintiffs filed a products liability action in Oklahoma alleging

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67. *Id.* at 253 (citations omitted).
68. 471 U.S. 462 (1985).
69. *See* Richman, *supra* note 37, at 612.
70. *Burger King*, 471 U.S. at 464-66.
71. *Id.* at 473.
72. *Id.* at 475 (citation omitted).
73. *Id.* at 478.
74. *Id.* at 479.
75. *Id.* at 482.
76. *Id.* at 481-82.
77. 444 U.S. 286 (1980).

that the injuries they sustained in an automobile accident there were the result of the defective design of an automobile they had purchased in New York .[78] The regional distributor and retail seller of the automobile, who were both named as defendants, argued that because they did no business in Oklahoma they had no contacts sufficient to support jurisdiction.[79] The Oklahoma Supreme Court upheld jurisdiction, reasoning that because of the inherently mobile nature of automobiles, their subsequent use in Oklahoma was foreseeable.[80] The Supreme Court granted certiorari and endorsed the stream of commerce theory, which had gained widespread acceptance in state courts since *Gray v. American Radiator & Standard Sanitary Corp.*,[81] stating "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[82] Ultimately, however, the Court concluded that the mere foreseeability that the automobiles could be taken to Oklahoma was not sufficient to satisfy due process.[83]

The Court revisited the scope of the stream of commerce theory in *Asahi Metal Industry Co. v. Superior Court of California*.[84] In *Asahi*, a four Justice plurality, led by Justice O'Connor, held that the stream of commerce theory requires more than mere foreseeability that a product will be purchased in the forum State, but also some additional conduct of the defendant specifically directed at the forum.[85] For example, Justice O'Connor reasoned that designing a product to serve the market in the forum, advertising in the forum State, establishing distribution channels or providing customer service in the forum

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78. *Id.* at 288.

79. *Id.* at 289.

80. *Id.* at 290. Further, the Oklahoma Supreme Court justified the assertion of jurisdiction by inferring that the defendants were deriving substantial income from products that were used in Oklahoma. *Id.*

81. 176 N.E.2d 761 (Ill. 1961). *See generally* Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 259 (1989).

82. *World-Wide Volkswagen*, 444 U.S. at 297-98.

83. *Id.* at 298.

84. 480 U.S. 102 (1987).

85. *Id.* at 112 (O'Connor, J., plurality opinion). Admittedly, a plausible reading of Justice O'Connor's plurality opinion suggests more than an interpretation of the stream of commerce theory, but rather a "marked retreat" from that doctrine. *See id.* at 118 (Brennan, J., concurring in part and in the judgment). *See generally* Murphy, *supra* note 81, at 250; Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105, 122 (1991). A closer reading, however, suggests that the stream of commerce theory will allow a court to assert jurisdiction over a defendant who has placed a product into the stream of commerce and has also engaged in conduct directed at the forum State where neither act by itself would be a sufficient contact to satisfy due process.

State might indicate an intent to serve the forum.[86] Another four Justices, led by Justice Brennan, disagreed with Justice O'Connor's formulation of the stream of commerce theory.[87] Justice Brennan rejected the requirement of additional conduct and concluded that mere awareness that a product is being marketed in the forum State is sufficient to satisfy the minimum contacts test.[88] The Court's fragmented decision in *Asahi* has created much uncertainty as to the proper application of the stream of commerce theory.[89]

3. Effects Test.—In *Calder v. Jones*,[90] the Supreme Court created what has become known as the "effects test." *Calder* involved a defamation action filed in California against two individuals who had written and edited an article published in the National Enquirer[91] allegedly containing libelous statements about the plaintiff. The editor and writer argued that because the work they performed in relation to the article was carried out entirely in Florida, they had no contacts with California sufficient to support jurisdiction.[92] The Court rejected this argument and held that jurisdiction was proper in California based on the 'effects' of the defendants' Florida conduct in California.[93] In reaching its conclusion, the Court stressed the facts that the defendants were aware that the plaintiff resided in California and knew the brunt of the harm from their actions would be felt there.[94] Additionally, the Court emphasized that the "effects test" was appropriate because the defendants were being charged with committing an intentional tort expressly aimed at the forum State as opposed to "mere untargeted negligence" that resulted in harm in the forum.[95] This aspect of the *Calder* decision has created confusion about the validity of the effects test outside the libel area, and its application to other intentional torts remains unclear.[96]

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86. *Asahi*, 480 U.S. at 112 (O'Connor, J., plurality opinion).

87. *Id.* at 116-21 (Brennan, J., concurring in part and in the judgment).

88. *Id.* A majority of the Court, including Justice Brennan, agreed that even if the defendant had sufficient contacts with the forum State, jurisdiction was unconstitutionally unreasonable and unfair. *Id.* at 113-16.

89. *See generally* Stephens, *supra* note 85; Murphy, *supra* note 81.

90. 465 U.S. 783 (1984).

91. The National Enquirer and its local distributing company were also named defendants. Neither the Enquirer nor the distributing company, however, objected to the jurisdiction of the California court. *Id.* at 785.

92. *Id.*

93. *Id.* at 789.

94. *Id.* at 790.

95. *Id.* at 789.

96. *Compare* Narco Avionics, Inc. v. Sportsman's Market, Inc., 792 F. Supp. 398, 408 (E.D. Pa. 1992) (rejecting use of effects test in patent infringement case and stating that there is "a critical difference between an intentional act which has an effect in the forum and an act taken for the very purpose of having an effect there") *with* Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1391 (8th Cir. 1991) (applying effects test in trademark infringement action). *See generally* Steven M. Reiss, *Applying the Effects Test Theory of Personal Jurisdiction in Patent Infringement*

B. Fair Play and Substantial Justice

If sufficient contacts are established, the courts will rarely deny jurisdiction based on considerations of fairness.[97] The defendant will have to present compelling arguments that forcing him to defend in the forum is so unfair and unreasonable that it violates due process.[98] This second element of the minimum contacts test ensures that a court's assertion of jurisdiction over a nonresident defendant comports with "the concept of 'fair play and substantial justice.'"[99] In *World-Wide Volkswagen*, the Court provided a detailed outline of the factors to be considered in analyzing the reasonableness of asserting jurisdiction over a nonresident defendant who has sufficient contacts such that jurisdiction is otherwise constitutionally permissible.[100] Those factors are: (1) the burden on the defendant, (2) the forum State's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering substantive social polices.[101] No one factor is necessarily controlling, but rather each factor should be balanced against the others in light of the circumstances of the case.[102]

III. ANALYZING INTERNET CONTACTS WITH THE FORUM

The key to ensuring that a defendant's due process rights are not violated is a properly focused inquiry into the defendant's contacts with the forum State to determine whether the defendant has purposefully directed his activities at the forum.[103] In cases where those contacts are through the Internet, this inquiry can quickly become confused by the boundless limits of the Internet. Indeed, if a court focuses on the global nature of the Internet, rather than the defendant's forum related contacts, the results will be questionable at best and unconstitutional at worst. As the following decisions illustrate, however, certain adaptations of the minimum contacts test have proven effective in cases involving the Internet.

Actions, 23 AIPLA Q.J. 99 (1995).

97. *See supra* notes 41-43 and accompanying text.

98. *See supra* note 42 and accompanying text.

99. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985).

100. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). The Court never actually reached the reasonableness issue, however, because it held that the defendants did not have sufficient contacts with the forum State. *Id.* at 299.

101. *Id.*

102. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 114 (1987) (according great weight to the burden on a foreign defendant in light of the forum State's weak interest in maintaining the suit).

103. *See supra* notes 45-47 and accompanying text.

A. Doing Business Through the Internet

Compuserve, Inc. v. Patterson[104] is an important decision to Internet users for at least two reasons. First, the court conducted a thorough and well reasoned analysis of the defendant's forum related contacts. Second, the defendant's activities illustrate the type of transactions that will likely comprise a large part of the business conducted through the Internet and other computer networks.[105]

In *Compuserve*, Richard Patterson, a Texas resident, subscribed to Compuserve, a national computer information service, headquartered in Ohio.[106] Compuserve's services included access to proprietary information as well as Internet access.[107] In addition to signing up for Compuserve's regular subscription service, Patterson also entered into a "Shareware Registration Agreement" ("SRA")[108] with Compuserve, whereby Compuserve would offer software products created by Patterson for sale.[109] Over a span of four years, Patterson electronically transmitted thirty-two software files to Compuserve's system in Ohio which were offered for sale pursuant to the SRA.[110] Additionally, Patterson advertised his software on the Compuserve system.[111] Compuserve began marketing a product that Patterson alleged had a name similar to a competing product he had previously developed and owned common law trademarks for.[112] Patterson notified Compuserve by e-mail of his allegations and demanded $100,000 to settle the dispute.[113] Compuserve filed a declaratory judgment action in an Ohio federal court, seeking a declaration that its products had not infringed on Patterson's common law trademarks.[114] The district court dismissed Compuserve's complaint concluding that Patterson's contacts with

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104. 89 F.3d 1257 (6th Cir. 1996).

105. *See supra* note 7.

106. *Compuserve*, 89 F.3d at 1260.

107. *Id.*

108. Interestingly, the SRA was a standardized online agreement created by Compuserve that was consummated by Patterson typing "AGREE" at various points on the screen. Nevertheless, the court described it as a "written" agreement. *Id.* at 1264.

109. The software to be sold was "shareware." Shareware is software made available to potential purchasers initially free of charge. Other Compuserve subscribers could download the shareware and if they continued to use it, were required to pay for it. Compuserve would retain 15% of any proceeds from the shareware and forward the rest to Patterson. Payments, however, were made voluntarily (i.e., Compuserve did not monitor unauthorized use of shareware). *Id.* at 1260.

110. *Id.* at 1261.

111. *Id.*

112. *Id.*

113. *Id.* Additionally, Patterson sent Compuserve regular mail messages, *id.* at 1264, and also posted a message on one of Compserve's electronic forums available to all Compuserve subscribers outlining his case against Compuserve. *Id.* at 1266.

114. *Id.* at 1261.

Ohio "were too tenuous to support the exercise of personal jurisdiction."[115]

The appellate court in *Compuserve* clearly recognized the potential ramifications of its decision to the future of business to be transacted through the Internet.[116] The contacts the court deemed relevant were thoroughly detailed and the court carefully articulated the principles that have evolved since *International Shoe* it considered appropriate in analyzing those contacts. The court reviewed Patterson's relevant forum related contacts outlined above and stated, "the real question is whether these connections with Ohio are 'substantial' enough that Patterson should reasonably have anticipated being haled into an Ohio court."[117]

Following the edict of *Burger King*, the court pointed out that "Patterson . . . entered into a written contract with CompuServe which provided for the application of Ohio law, and he then purposefully perpetuated the relationship with CompuServe via repeated communications with its system in Ohio."[118] The court was careful to note that it was not basing jurisdiction on Patterson's purchase of services, but rather emphasized Patterson's use of CompuServe as a distributor for his software products.[119] Specifically, the court stated:

> The district court[] . . . disregard[ed] the most salient facts of [the] relationship: that Patterson chose to transmit his software from Texas to CompuServe's system in Ohio, that myriad others gained access to Patterson's software via that system, and that Patterson advertised and sold his product through that system. . . . [T]here can be no doubt that Patterson purposefully transacted business in Ohio.[120]

Significantly, the court was also careful to point out that it was not basing jurisdiction on the stream of commerce theory stating, "Patterson's injection of his software into the stream of commerce, without more, would be at best a dubious ground for jurisdiction."[121] Instead, the court analogized the case to *McGee*, describing Patterson's conduct as consciously reaching out to Compuserve in Ohio much like the defendant in *McGee* consciously solicited business in California.[122] Further, the court emphasized that the software marketing relationship Patterson had perpetuated was "ongoing in nature" and "not a one-shot affair."[123] The court's emphasis on the written agreement, the long term relationship between Patterson and Compuserve, and the Ohio choice of law provision are significant. These factors, especially the choice of law provision, evinced Patterson's knowledge that he was dealing with an Ohio business.

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115. *Id.* at 1260.
116. *See id.* at 1262.
117. *Id.* at 1264.
118. *Id.*
119. *Id.*
120. *Id.* at 1264-65.
121. *Id.* (citations omitted).
122. *Id.* at 1266.
123. *Id.* at 1265 (citation omitted).

The connectivity of the Internet will likely result in many contractual relationships being formed entirely through electronic means.[124] Disputes arising out of such contractual relationships, however, do not necessarily present novel issues related to personal jurisdiction simply because the contract was entered into and carried out through the Internet. *Compuserve* provides an excellent model for the proper analysis of such cases. Courts should carefully analyze the relationship between the parties and look to the reasoning of *Burger King* to determine whether personal jurisdiction comports with due process. By emphasizing the relationship between the defendant and forum residents, rather than the method by which that relationship was formed, the inquiry will remain properly focused on whether the defendant's activities were purposefully directed at the forum State.

B. Application of the Stream of Commerce Theory to the Internet

In many cases, the defendant's contacts with the forum will consist primarily of information or products accessible by forum residents through the Internet. Unlike *Compuserve*, however, the defendant may not have established a formal relationship with a forum resident or conducted substantial business in the forum State. Extending the stream of commerce theory to such cases will provide an appropriate method for analyzing whether the defendant's forum contacts are sufficient to satisfy due process. Distributing products and information through the Internet is analogous to a manufacturer selling a product through the distribution channels of third parties. In either case, it is foreseeable that the information or products distributed could cause harm in a number of states.

Given the divergent views expressed by the Supreme Court in *Asahi*,[125] however, a court will initially have to decide how broadly the stream of commerce theory should be applied. Because it is foreseeable that information placed on the Internet can be accessed in every state, a broad interpretation of the stream of commerce theory will result in virtually no predictability as to where Internet users may be forced to defend themselves.[126] Therefore, the additional conduct required by Justice O'Connor's formulation of the stream of commerce theory[127] is necessary to maintain a "degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable

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124. *See supra* note 7.

125. *See supra* notes 84-89 and accompanying text.

126. *Cf.* Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 116-21 (1987) (Brennan, J., concurring in part and in the judgment) (asserting that the defendant's mere expectation that its products will be marketed in the forum State is a sufficient contact to satisfy due process).

127. *Id.* at 108-13 (O'Connor, J., plurality opinion) (holding that conduct purposefully directed at the forum State is required in addition to placing a product into the stream of commerce).

to suit."[128]

A recent case illustrates how easily this predictability can be eroded by the improper application of the stream of commerce theory to cases involving the Internet. In *Inset Systems, Inc. v. Instruction Set, Inc.*,[129] Inset Systems, Inc. ("Inset") filed suit against Instruction Set, Inc. ("ISI") in Connecticut. Inset, a Connecticut corporation, had obtained a federally registered trademark for the mark "INSET" in 1986.[130] Subsequently, ISI, a Massachusetts corporation, registered the domain name[131] "INSET.COM" as its Internet address and established a Web site with that domain name to advertise its products and services.[132] ISI had also established the toll-free telephone number "1-800-US-INSET."[133] Both Inset and ISI provided computer services to customers throughout the world.[134] ISI, however, did not have any employees or offices in Connecticut, and did not conduct business in Connecticut on a regular basis.[135]

The court in *Inset* framed the issue as whether ISI, as a result of its Web site, had "purposefully avail[ed] itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws."[136] In deciding this question, the court characterized ISI's Web site as substantial advertising in Connecticut stating, "[ISI] has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states."[137] Further, the court stated, "[a]dvertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI has therefore, purposefully

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128. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

129. 937 F. Supp. 161 (D. Conn. 1996).

130. *Id.* at 163.

131. A domain name is analogous to a street address. A domain name is a string of characters used to identify the location of a particular Web site on the Internet. *See id.*

132. *Id.*

133. *Id.*

134. *Id.* at 162.

135. *Id.* at 163.

136. *Id.* at 164 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). The court in *Inset* did not expressly rely on the stream of commerce theory. Rather, the court held that the defendant's advertising through the Internet constituted doing business in the forum State. *Id.* at 165. There were no allegations, however, that the defendant had conducted sales or derived any economic benefit in the forum State. Nevertheless, the court concluded that jurisdiction was justified based on the defendant's expectation that its Web site could be accessed by forum residents. *Id.* The failure to require conduct directed at the forum in addition to the Web site achieved the same result as if a pure stream of commerce theory had been applied. *Cf.* Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 116-21 (1987) (Brennan, J., concurring in part and in the judgment) (rejecting requirement of additional conduct so long as a defendant has placed a product into stream of commerce with expectation that it will be marketed in the forum State).

137. *Inset*, 937 F. Supp. at 165.

availed itself of the privilege of doing business within Connecticut."[138]

The court's analysis in *Inset* was misguided and its holding reaches too far. The court reasoned that by placing the advertisement on the Internet, it was foreseeable that the ad would reach Connecticut, and therefore ISI "could reasonably anticipate the possibility of being hailed into court [there]."[139] Indeed, under the court's reasoning, by establishing a Web page, ISI rendered itself amenable to jurisdiction in every state for claims arising out of its Web site. By focusing on the boundless nature of the Internet, the court failed to make an appropriate inquiry into ISI's actual contacts with the forum State and consequently never fully analyzed the nature of those contacts.

Justice O'Connor's stream of commerce theory from *Asahi*,[140] however, provides an appropriate method for analyzing cases such as *Inset*. In *Bensusan Restaurant Corp. v. King*,[141] for example, Bensusan Restaurant Corp. ("Bensusan") filed suit in New York against Richard King. Bensusan owned and operated a jazz club in New York city known as "The Blue Note."[142] Bensusan had obtained a federally registered trademark for "The Blue Note."[143] The defendant, King, also owned and operated a jazz club known as "The Blue Note" located in Columbia, Missouri.[144] King had established a Web site that contained general information about his club such as a calendar of events and ticketing information.[145] Tickets could only be ordered in person or by phone, however, and could only be picked up the day of a show at the club.[146] Bensusan alleged that King's Web site constituted trademark infringement, trademark dilution, and unfair competition.[147]

In concluding that the assertion of jurisdiction over the defendant would violate due process, the court in *Bensusan* followed Justice O'Connor's stream of commerce theory.[148] The court stated, "[c]reating a [Web] site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, *without more*, it is not an act purposefully directed toward the forum State."[149] Specifically, the court noted that King had not actively sought

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138. *Id.*

139. *Id.*

140. *See supra* notes 85-86 and accompanying text.

141. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

142. *Id.* at 297.

143. *Id.*

144. *Id.*

145. *Id.* Additionally, King's Web site contained a disclaimer distinguishing his club from Bensusan's referring to the New York "Blue Note" as "one of the world's finest jazz club[s]." *Id.* at 297-98.

146. *Id.* at 297.

147. *Id.* at 298.

148. Actually, it was unnecessary for the court in *Bensusan* to discuss the due process issue because the court had already concluded that New York's long arm statute did not authorize the court to exercise jurisdiction over King. *Id.* at 300.

149. *Id.* at 301 (emphasis added) (citing Asahi Metal Indus. Co. v. Superior Court of

to encourage New York residents to access his site nor had he conducted any business in New York.[150]

The additional conduct required by Justice O'Connor's stream of commerce theory may be inherent to a Web site itself. For example, in *Bensusan*, the court noted that Internet users could not order tickets directly from King's Web site.[151] Additionally, the court pointed out that even if a New York resident ordered tickets by telephone, the tickets would have to be picked up at the Missouri box office because King did not fill ticket orders by mail.[152] Under the stream of commerce theory employed by the court in *Bensusan*, the ability of New York residents to order tickets through King's Web site would have evinced King's intent to serve the forum through his Web site.

In cases involving the Web, this distinction between a Web site that is "interactive" and one that is "passive" should be a key consideration in determining whether the additional conduct required by Justice O'Connor's stream of commerce theory is present. For example, in *Maritz, Inc. v. Cybergold, Inc.*,[153] the defendant was using an interactive Web site to solicit forum residents for a service it planned to offer through the Internet.[154] Unlike *Inset* or *Bensusan*, the Web site in *Maritz* was much more than a passive advertisement of the defendant's services. The interactive nature of the defendant's Web site satisfied two of the categories of additional conduct posited by Justice O'Connor in her formulation of the stream of commerce theory.[155] The Web site's ability to register forum residents for services demonstrated that it was a product designed for the market in the forum.[156] Moreover, its interactive nature allowed the Web site to serve as a distribution channel in the forum for the defendant's services.[157]

California, 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion)).

150. *Id.*

151. *Id.* at 299. The passive nature of the defendant's Web site was pointed out by the court in its discussion of New York's long arm statute. If, however, the Web site had been interactive and allowed New York residents to order tickets through the Web site, the court's discussion suggests it may have been willing to assert personal jurisdiction over the defendant.

152. *Id.*

153. 947 F. Supp. 1328 (E.D. Mo. 1996).

154. *Id.* at 1330.

155. *See supra* note 86 and accompanying text.

156. Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion).

157. *Maritz*, 947 F. Supp. at 1330. Unfortunately, in *Maritz*, the court appeared to give little weight to the fact the defendant's Web site was interactive and being used to actively serve forum residents. Instead, the court followed the reasoning of *Inset* and appeared to base jurisdiction on the notion that by creating a Web site, the defendant had purposefully directed its activities toward all states. *Id.* at 1333. It is unlikely the court's jurisdictional holding would have been different even if the defendant's Web site had been purely passive. In contrast, other courts have emphasized the distinction between interactive and passive Web sites in applying the minimum contacts test. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); SF Hotel Co., L.P. v. Energy Investments, Inc., 985 F. Supp. 1032 (D. Kan. 1997); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952

These cases illustrate the utility of Justice O'Connor's stream of commerce theory in performing the contacts analysis when the defendant's forum related contacts consist primarily of information or products accessible in the forum State through the Internet. Using Justice O'Connor's stream of commerce theory, the *Bensusan* court was able to clearly focus on the defendant's lack of purposeful direction toward the forum State. In contrast, the court in *Inset* based its holding on the inaccurate notion that because a Web site is accessible everywhere, the defendant has purposefully directed its activities everywhere, including the forum State. This is precisely the unlimited foreseeability rejected by the Court in *World-Wide Volkswagen*.[158] The additional conduct required by Justice O'Connor's stream of commerce theory is necessary to realize the predictability contemplated by *International Shoe* and its progeny.[159]

C. Internet Torts and the Effects Test

Application of the effects test in Internet cases is particularly problematic. In libel cases not involving the Internet, lower courts have reached varying conclusions as to the scope of the effects test.[160] Moreover, use of the effects test outside the area of libel has been described as an abolition of the two part minimum contacts test.[161] Given the increased ability to engage in interstate activity through the Internet, courts will be faced with competing concerns. Clearly, states have an interest in protecting forum residents from intentional conduct that could cause harm in the forum as a result of the far-reaching effects of the Internet. On the other hand, there should be a heightened concern over a court exceeding its constitutional authority by asserting jurisdiction over a nonresident who has not purposefully directed an act toward the forum State. Several recent cases demonstrate why courts should narrowly apply the effects test in Internet cases, especially those not involving defamation.

1. Defamation Through the Internet.—In *California Software Inc. v. Reliability Research, Inc.*,[162] California Software Inc. and Reliacomm, Inc. (collectively "plaintiffs"), both California corporations, filed suit in California

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F. Supp. 1119 (W.D. Pa. 1997).

158. *See supra* note 83 and accompanying text.

159. *See Asahi*, 480 U.S. at 110 (O'Connor, J., plurality opinion); *World-Wide Volkswagen*, 444 U.S. at 297.

160. *Compare* Southmark Corp. v. Life Investors, Inc., 851 F.2d 763 (5th Cir. 1988) (narrow interpretation of *Calder*), *with* Shaw v. North Am. Title Co., 876 P.2d 1291 (Haw. 1994) (broad interpretation of *Calder*). *See generally* Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 ALB. L. REV. 1083, 1124 (1996) (arguing that the narrow construction is the "better-reasoned view").

161. Green v. USF & G Corp., 772 F. Supp. 1258, 1262 (S.D. Fla. 1991) (stating that "it would seem to vitiate the two-part approach to jurisdiction to hold that in every case where a tort has occurred in the state, the exercise of jurisdiction comports with due process").

162. 631 F. Supp. 1356 (C.D. Cal. 1986).

against Reliability Research, Inc. ("RRI"), a Nevada corporation with its principal place of business in Vermont, and James White, the president of RRI. The complaint alleged, *inter alia*, that White, on behalf of RRI, had made libelous statements about the plaintiffs through the use of the telephone, mails, and a nationwide computer network.[163] Reliacomm and RRI were involved in an ongoing dispute concerning the ownership of a software product called resCue/MVS ("MVS") that they each intended to market.[164] White placed a message on a computer bulletin board service ("BBS")[165] that informed users they would be held financially responsible for any unauthorized use of MVS should RRI prevail in the ownership dispute.[166] The plaintiffs alleged that the BBS message contained libelous statements and dissuaded at least three companies from purchasing MVS from them.[167]

After generally discussing the principles involved in minimum contacts analysis, the court eventually decided that the effects test was the appropriate method to resolve the jurisdictional question.[168] Although the court generally discussed the requirement of purposeful direction, its reasoning was clearly based on *Calder*. Significantly, the court concluded that the BBS message alone was a sufficient contact with California to satisfy due process.[169] Specifically, the court stated, "[d]efendants made tortious statements which, though directed at third persons outside California, were expressly calculated to cause injury in California. As in *Calder*, the defendants knew that plaintiffs would feel the brunt of the injury, i.e., the lost income, in California."[170]

The defendants argued, however, that although the statements were made intentionally, they were made in response to prior messages that had been placed on the BBS by third parties inquiring about the status of the MVS software, distinguishing the case from *Calder*.[171] The court flatly rejected this argument stating, "the conversational format . . . does not affect the jurisdictional analysis."[172] In addressing this argument, the court pointed out that by

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163. *Id.* at 1357-58. Larry Martin, the treasurer of RRI, was also named as a defendant. There was no evidence, however, of any relevant conduct on the part of Martin related to the claim, and the court concluded that there was no basis for asserting jurisdiction over him. *Id.* at 1364.

164. *Id.* at 1358. Reliacomm and RRI each claimed ownership of the software. California Software had entered into a sublicensing contract with Reliacomm and intended to market the software on behalf of Reliacomm. *Id.*

165. A Bulletin Board System allows users to place messages and view messages that have been placed on the system by other users. Essentially, newsgroups operate like bulletin board systems. *See supra* note 19.

166. California Software Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1358 (C.D. Cal. 1986).

167. *Id.*

168. *Id.* at 1360-63.

169. *Id.* at 1361.

170. *Id.* (citations omitted).

171. *Id* at 1363.

172. *Id.*

responding to the inquiries on the BBS the defendants made the messages "available to an audience wider than those requesting the information."[173] Moreover, the court emphasized that the defendants made the libelous statements with the knowledge that they stood to derive economic benefit as a result of the harm the plaintiffs would suffer.[174]

Although *California Software* does not involve use of the Internet, the court's application of the effects test to the BBS messages could have significant implications for Internet users if the court's application of *Calder* is followed. A message posted to a BBS, such as the one in *California Software*, is substantially similar to a posting made to a newsgroup or listserv.[175] Additionally, there are many BBS systems that are accessible through the Internet and many Web sites allow users to post messages much like a BBS. The court's rejection of the defendant's argument that the messages were "conversational" and therefore distinguishable from the intentionally harmful libel in *Calder* is significant. Virtually all of the content posted to newsgroups and listservs is conversational in nature. Under *California Software*, however, the argument that a libelous statement was not intentionally harmful because it was merely made in the midst of an electronic discussion would probably be unsuccessful.

Edias Software International, L.L.C. v. Basis International Ltd.,[176] is a more recent case involving libelous statements distributed through the Internet. Edias, an Arizona company, sued Basis, a New Mexico company, in Arizona over a contract dispute between the two companies.[177] Edias alleged that Basis had sent e-mail messages containing defamatory statements to Edias' customers and Basis' employees in Europe.[178] Edias also alleged that Basis placed additional defamatory statements on its Compuserve Web page and in a Compuserve CIS forum.[179] Although the court stated that Basis' contractual relations with Edias were probably a sufficient basis for jurisdiction,[180] it nevertheless analyzed the defamatory statements sent through the Internet to determine if they alone would satisfy the minimum contacts requirement under the effects test.[181]

The court in *Edias* seemed to require an even lesser showing of intentional harm than the court in *California Software*. In fact, the degree of harmful intent directed at a forum resident previously required by the Supreme Court[182] was watered down to foreseeability.[183] Specifically, the court stated, "if Basis could

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173. *Id.*

174. *Id.* at 1362-63.

175. *See supra* notes 19-20.

176. 947 F. Supp. 413 (D. Ariz. 1996).

177. *Id.* at 415.

178. *Id.*

179. *Id.* at 416. A CIS forum is essentially a bulletin board system made available to Compuserve subscribers.

180. *Id.* at 418.

181. *Id.*

182. *See* Calder v. Jones, 465 U.S. 783, 789-90 (1984).

183. *Edias*, 947 F. Supp. at 420.

foresee that the result of the statements *might* be to deter potential Edias customers, then Basis could also foresee that the injury *might* be felt in Arizona."[184]

Both *California Software* and *Edias* show that the courts are ready and willing to broadly apply the effects test to cases involving defamatory statements distributed through the Internet. Although a greater degree of harmful intent was emphasized in *Calder*, these courts lowered the threshold to protect parties from the increased potential for harm that results from the worldwide availability of defamatory information posted to the Internet and other nationwide computer networks. As stated in *California Software*, "[u]nlike communication by mail or telephone, messages sent through computers are available to the recipient and anyone else who may be watching."[185] While this concern is not without merit, the court's conclusion in *Edias*—that the *foreseeability* that statements *might* cause harm in the forum State is sufficient to confer jurisdiction—is somewhat forbidding.[186]

2. Other Internet Torts.—In *Panavision International, L.P. v. Toeppen*,[187] a California federal court stretched the effects test well beyond the facts of *Calder*. *Panavision* vividly illustrates how the effects test can be used to transform an extremely tenuous contact with a distant state through Internet-related activity into a contact sufficient to satisfy the minimum contacts test. In this case, Panavision International, L.P. ("Panavision"), a Delaware limited partnership with its principal place of business in California, filed suit in California against Dennis Toeppen, an individual residing in Illinois.[188] Panavision owned the federally registered trademarks "Panavision" and "Panaflex," which it used in connection with its motion picture and television camera and photographic equipment businesses.[189] In 1995, Toeppen registered the domain name "PANAVISION.COM" and later set up a Web site displaying aerial views of Pana, Illinois.[190] When Panavision learned of Toeppen's registration of "PANAVISION.COM" as a domain name, Panavision notified Toeppen of its intent to use the "Panavision" trademark as a domain name.[191] Toeppen then informed Panavision he would relinquish the domain name for $13,000.[192] Subsequent to Panavision's informing Toeppen of its intent to register the "Panavision" trademark as a domain name, Toeppen also registered

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184. *Id.* (emphasis added).

185. California Software Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1363 (C.D. Cal. 1986).

186. *Edias*, 947 F. Supp. at 420.

187. 938 F. Supp. 616 (C.D. Cal. 1996).

188. *Id.* at 618. Network Solutions, Inc. ("NSI"), the organization responsible for the registration of Internet domain names, was named as a defendant. *Id.* NSI apparently did not object to the jurisdiction of the California court.

189. *Id.*

190. *Id.* at 619.

191. *Id.*

192. *Id.*

the domain name "PANAFLEX.COM."[193] Significantly, Toeppen did not offer to sell any products or services through his Web sites.[194]

The court in *Panavision* was faced with a dilemma—it obviously sympathized with Panavision's plight, but was hard pressed to find a contact between Toeppen and California sufficient to satisfy due process. The court characterized Toeppen's registration of the domain name "PANAVISION.COM" as an intentional tort expressly aimed to cause harm to Panavision, thereby making the effects test available.[195] The court concluded that Toeppen had intentionally registered the domain name with the knowledge that this would result in harm in California as a result of Panavision's inability to use the domain name.[196]

The court's use of the effects test in *Panavision* presents a number of jurisdictional problems.[197] Current trademark laws do not provide any relief for noncommercial use of a federally registered trademark.[198] If Toeppen's registration of the domain name was not a commercial use of the trademark, it was not an infringement under trademark laws. Consequently, the court's characterization of Toeppen's conduct as tortious would obviously have been without merit. To get around this, the court was forced to reason that Toeppen's $13,000 demand to relinquish the domain name was a commercial use of the trademark.[199]

This creates another jurisdictional dilemma that the court failed to address. Panavision contacted Toeppen, which resulted in Toeppen simply informing Panavision of the price for which he would be willing to relinquish the domain name.[200] Based on the court's reasoning, if Toeppen had simply told Panavision he was not interested in selling the rights to the domain name, then his conduct would not have been "tortious" and he would not have been amenable to jurisdiction in California.[201] By reacting to the communication that Panavision

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193. *Id.* The court also pointed out that Toeppen was a defendant in two other suits involving his use of federally registered trademarks as domain names, and that Toeppen had registered several other domain names that were similar to famous trademarks. *Id.*

194. *Id.*

195. *Id.* at 621.

196. *Id.*

197. The concerns with the effects test are not unique to cases involving the Internet. *See supra* notes 96, 160-61 and accompanying text. Because of our increased ability to engage in interstate activity through the Internet, however, the concerns of using the effects test outside the area of defamation are intensified.

198. *See* Panavision Int'l, L.P. v. Toeppen, 945 F. Supp. 1296, 1303 & n.5 (C.D. Cal. 1996) (stating, "registration of a trade[mark] as a domain name, without more, is not a commercial use of the trademark and therefore not within the prohibitions of the Act.").

199. *Panavision Int'l*, 938 F. Supp. at 621-22.

200. *Id.* at 619.

201. Apparently, if Toeppen had registered the domain name "PANAVISION.COM" as part of what the court considered a "legitimate business use," the court would not have had jurisdiction because Toeppen's conduct would not have been intended to harm Panavision. Specifically, the

initiated, however, Toeppen rendered himself amenable to jurisdiction wherever Panavision may have been located.

All of this serves to illustrate the impropriety of the court's application of the effects test in *Panavision*. While the end may appear to justify the means, the decision demonstrates the potentially unlimited power courts can have over nonresidents when the effects test is stretched too far beyond the facts of *Calder*. Additionally, as illustrated by *Edias*, lowering the threshold of harmful intent, even in defamation cases, may result in broader assertions of jurisdiction than the *Calder* Court intended. A liberal application of the effects test in cases involving the Internet presents a serious threat of nonresidents being forced to travel to distant forums to defend themselves for conduct that was not purposefully directed at those forums.

IV. FAIR PLAY AND SUBSTANTIAL JUSTICE ON THE INTERNET

Not surprisingly, most courts faced with personal jurisdiction questions involving the Internet have given little consideration to the second step of the minimum contacts test.[202] The courts routinely begin by emphasizing the forum State's interest in protecting the plaintiff from whatever harm may have been alleged in the case.[203] These interests, combined with the plaintiff's interest in obtaining relief in a convenient forum, are then balanced against the burden on the defendant of having to travel to the forum State.[204] Given the compelling burden placed on the defendant to show jurisdiction is unreasonable, it is difficult to argue that the results in these cases do not comport with the fairness requirements of *International Shoe* and its progeny.[205]

Nevertheless, the *Panavision* court's treatment of the fairness considerations is somewhat troubling. The court in *Panavision* treated the fairness

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court distinguishes *Bensusan* by stating, "the parties had legitimate businesses and legitimate legal disputes. Here, however, Toeppen is not conducting a business but is, according to Panavision, running a scam directed at California." *Id.* at 622.

202. *See infra* notes 203-04 and accompanying text. *But see* Expert Pages v. Buckalew, No. C-97-2109-VRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997) (holding exercise of personal jurisdiction would be "constitutionally unreasonable" despite conclusion that defendant's Internet contacts were sufficient to satisfy due process); *cf.* Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 470-72 (D. Mass. 1997) (asserting jurisdiction but carefully considering the "fairness and reasonableness" of its decision).

203. *See* Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1268 (6th Cir. 1996); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1332 (E.D. Mo. 1996); California Software Inc. v. Reliability Research, Inc., 631 F. Supp 1356, 1363 (C.D. Cal. 1986).

204. *See Compuserve*, 89 F.3d at 1268; Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996); *Maritz*, 947 F. Supp. at 1334; *California Software*, 631 F. Supp at 1363-64; Edias Software Int'l, L.L.C. v. Basis Int'l, Ltd., 947 F. Supp. 413, 421 (D. Ariz. 1996).

205. The court in *Bensusan* did not reach the fairness issue because it concluded that the defendant did not have sufficient contacts with the forum State. *See supra* notes 140-52 and accompanying text.

considerations in a most conclusory fashion. Once again, the court relied on its characterization of the defendant's actions as tortious to justify its conclusory assertions stating, "[i]n the tort setting, if a nonresident, acting outside the state, intentionally causes injuries within the state, local jurisdiction is presumptively not unreasonable . . . ."[206]

The court noted the interests to be considered in analyzing fairness, but then failed to provide any discussion of how these competing interests were balanced.[207] Instead, the court simply stated, "[a]fter balancing the seven factors from *Burger King*, it is clear that jurisdiction over [the defendant] comports with 'fair play and substantial justice.'"[208] Although the court did briefly mention the potential burden of an individual residing in Illinois being haled into a California court, it quickly dismissed this concern with an oft-quoted line from *Burger King*—"in this era of fax machines and discount air travel requiring [the defendant] to litigate in California is not constitutionally unreasonable."[209]

Justice Brennan's statement from *Burger King*, however, must be considered in light of the facts and significance of that case. The defendant in *Burger King* had initiated and entered into a substantial contract with a resident of the forum State.[210] Moreover, in *Burger King*, Justice Brennan dedicated a substantial amount of his opinion to the fairness aspects of the minimum contacts test.[211] There will likely be many instances in the future where individuals establish tenuous contacts with a distant forum through the Internet. Courts should be cognizant of such cases and, despite the defendant's compelling burden on this issue, give elements of fairness the appropriate consideration.

CONCLUSION

This Note has demonstrated that certain adaptations of the minimum contacts test, if applied properly, are capable of fairly and efficiently handling jurisdictional issues involving the Internet. The cases discussed illustrate that when a court focuses on the defendant's contacts with the forum through the Internet, personal jurisdiction decisions are much more likely to comport with the requirements of the Due Process Clause. By contrast, when a court becomes sidetracked and focuses on the boundless limits of the Internet, the defendant's

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206. *Panavision*, 938 F. Supp. at 622.

207. *Id.*

208. *Id.*

209. *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985)).

210. The defendant in *Burger King* had obligated himself to payments exceeding $1 million payable over a 20-year period. *Burger King*, 471 U.S. at 466.

211. *See id.* at 477-78, 482-87. Indeed, Justice Brennan was a relentless advocate for the abolition of the bifurcated contacts plus fairness test in favor of an analysis that considered contacts in light of a balancing of the interests of the plaintiff, defendant, and forum. *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299-313 (1980) (Brennan, J., dissenting). *See generally* Pamela J. Stephens, *The Single Contract as Minimum Contacts: Justice Brennan 'Has it His Way'*, 28 WM. & MARY L. REV. 89 (1986).

due process rights will often be lost in the confusion.

Compuserve provides an appropriate framework for due process analysis in cases involving parties that have entered into contractual relationships and conducted business through the Internet. Justice O'Connor's formulation of the stream of commerce theory has proven effective for analyzing situations where the defendant's forum related contacts consist primarily of information or products accessible in the forum State through the Internet. Use of the effects test should be limited to cases where defamatory information has been distributed through the Internet. Moreover, even in libel cases, straying too far from the facts of *Calder* may result in assertions of jurisdiction that do not comport with due process. Finally, the ease with which Internet users can establish tenuous contacts with distant forums should give courts reason to consider the fairness and reasonableness of forcing nonresidents to defend themselves in those forums, despite the defendant's compelling burden on this issue.

One of the principal purposes of the Due Process Clause is to promote "'the orderly administration of the laws,' . . . and give a degree of predictability to the legal system . . . ."[212] Shifting the focus away from the defendant in due process analysis will significantly impede this goal. Of course, interacting in the new global society the Internet is creating requires acceptance of an increased risk of being forced to defend a lawsuit in a distant forum. Proper application of the minimum contacts test will provide individuals using the Internet with at least "some minimum assurance as to where that conduct will and will not render them liable to suit."[213]

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212. *World-Wide Volkswagen*, 444 U.S. at 297 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

213. *Id.*

TITLE VII AND REVERSE DISCRIMINATION: THE PRIMA FACIE CASE

JANICE C. WHITESIDE*

INTRODUCTION

In recent years, the number of claims filed under Title VII has virtually exploded.[1] Although most envision discrimination as an evil directed against minorities and women, a substantial number of recent claims have involved "reverse" discrimination.[2] Despite the number of reverse discrimination claims, the circuits have been unable to agree upon the requirements of the *McDonnell Douglas*[3] prima facie case for a reverse discrimination claim. The disagreement has centered around the first element of the prima facie case. The issue must be resolved because a recent decision which severely restricted the permissible scope of affirmative action programs may further increase the number of reverse discrimination claims filed.[4] This Note analyzes how the Supreme Court of the United States will resolve the issue.

Section I discusses the Court's decisions addressing Title VII. It outlines the

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1. 42 U.S.C. § 2000e-2(a) (1994) provides that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." In fiscal 1995, the Equal Employment Opportunity Commission received approximately 87,500 complaints. About 34% of those cases involved race discrimination, and 30% involved sex discrimination. Blacks filed 86% of the approximately 30,000 charges based upon race, and the remaining 14% involved reverse racial discrimination claims. Sheila M. Poole & Gertha Coffee Braxton, *Personal Business Bias in the Workplace, Two High-Profile Lawsuits Chill Companies, Give Workers Support*, ATLANTA J. & CONST., Dec. 9, 1996, at E1.

2. The term "reverse" discrimination is used throughout this Note for convenience. It refers to discrimination against members of groups which have not traditionally been subjected to discrimination, such as nonminorities and males. The author does not intend to imply that a claim of discrimination by a nonminority or male plaintiff is less legitimate than a claim by a minority or female plaintiff. This Note will focus on reverse discrimination claims involving denial of employment opportunities due to race and sex discrimination; however, other types of reverse discrimination exist. *See* David E. Rovella, *Accused Sexual Harassers Strike Back With Suits, Men Are Alleging Reverse Discrimination, Claiming Management Failed to Punish Women For Similar Actions*, NAT'L L.J., Aug. 28, 1995, at B1.

3. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

4. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all governmental affirmative action programs, whether federal, state, or local, will be subject to strict scrutiny review). Thirty-four percent of the race discrimination cases decided by the Court during the first five years of Chief Justice Rehnquist's term were asserted by whites. This increase may be due to a perception on the part of whites that the Court is friendly toward reverse discrimination claims. Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1275 (1990).

basic framework for disparate treatment claims established in *McDonnell Douglas* and highlights the Court's important decisions elaborating upon the framework which will serve as a basis for arriving at a conclusion.[5] Section II examines the various approaches which courts have taken in analyzing the prima facie case in reverse discrimination claims and the reasoning underlying those approaches. Section III analyzes the Court's previous discrimination decisions in the context of reverse discrimination, and applies that analysis to the prima facie case in reverse discrimination claims. Section IV concludes that the Court should not alter the prima facie case established in *McDonnell Douglas* when it is applied in reverse discrimination cases.

I. THE *MCDONNELL DOUGLAS* FRAMEWORK[6]

In *McDonnell Douglas Corp. v. Green*, a black employee sued his employer under Title VII for racial discrimination. The employee was not rehired by the defendant after he participated in and was partially responsible for organizing protests against the defendant. The Court ruled that the plaintiff could establish a prima facie case of race discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[7]

The Court acknowledged that the facts necessary to prove a prima facie case will vary and that the above formulation will not apply in every case.[8]

After the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate "some legitimate, nondiscriminatory reason for the employee's rejection."[9] If the defendant is able to do so, then the plaintiff must

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5. A disparate treatment claim is one in which the plaintiff claims that the employer treated him differently because of a characteristic protected under Title VII. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The cases relevant to the resolution of the question are not limited to claims involving disparate treatment under Title VII. Claims involving affirmative action are also relevant to the question insofar as they demonstrate the court's overall approach to discrimination claims and questions of race and sex. *See infra* Parts I & III.

6. For a survey of the Court's race discrimination in employment cases decided prior to the enactment of Title VII, see THE SUPREME COURT ON RACIAL DISCRIMINATION 225-72 (Joseph Tussman ed., 1963).

7. *McDonnell Douglas*, 411 U.S. at 802.

8. *Id.* at 802 n.13. The court held that the plaintiff successfully established a prima facie case because the defendant sought to hire mechanics, plaintiff was a mechanic, he applied for the job, his qualifications were not disputed, and the defendant continued to seek mechanics after rejecting plaintiff. *Id.* at 802.

9. *Id.* at 802. The court accepted as sufficient the defendant company's statement that the plaintiff's participation in illegal protest activities directed at the defendant was the reason he had

be given an opportunity to show that the stated reason for the rejection was a pretext for intentional discrimination.[10] The Court stated that, in that particular case, the evidence that might be relevant to show pretext included: the defendant's general policy with respect to the employment of minorities including statistics that would show a general pattern of discrimination against minorities, the defendant's past response to the plaintiff's participation in civil rights activities, and the defendant's treatment of the plaintiff during previous employment with the defendant.[11] With respect to statistics showing past discrimination by the defendant, the Court cautioned that "such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision . . . ."[12]

The Court stated that the purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[13] The Court further stated that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[14] In sum, *McDonnell Douglas* enunciates that the primary purpose of Title VII is to assure neutral employment decisions.

In 1976, the Court revisited the discrimination issue in *McDonald v. Santa Fe Trail Transportation Co.*[15] In that case, two white employees claimed that they had been victims of racial discrimination. The defendant company discharged the plaintiffs after they participated in criminal activity directed against the defendant company, but it retained a black employee who had also participated in the activity. The Court held that Title VII provides protection to majority as well as minority employees.[16] In so holding, the Court stated that "Title VII prohibits racial discrimination against [whites] upon the same standards as would be applicable were they Negroes and [the non-discharged employee] white."[17] In *McDonald*, the Court clearly applied the *McDonnell Douglas* standard when a white claimed race discrimination. *McDonnell Douglas* was the only standard articulated to prove intentional discrimination with circumstantial evidence at the time of the *McDonald* decision. In addition, the legislative history of Title VII shows that Congress intended that it cover all

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not been rehired. *Id.* at 803.

10. *Id.* at 804.
11. *Id.* at 804-05.
12. *Id.* at 805 n.19.
13. *Id.* at 800 (citing Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971)).
14. *Id.* at 800-01 (citing *Griggs*, 401 U.S. at 431).
15. 427 U.S. 273 (1976).
16. *Id.* at 280.
17. *Id.*

employees, not just members of historically disadvantaged groups.[18] In discussing the applicability of Title VII to whites claiming racial discrimination and males claiming sex discrimination, Congress did not indicate that the standards used to establish discrimination should differ in any way from those to be used by minorities and females.

The Court rejected the *McDonald* defendant's argument that discrimination in favor of minorities in isolated cases, when it does not place a heavy burden on whites as a group, is permissible. "There is no exception in the terms of [Title VII] for isolated cases . . . ."[19] The Court does not require that a Title VII plaintiff show discrimination against other members of the group to which the plaintiff belongs, and the fact that no previous discrimination has occurred is not determinative on the question of whether it occurred in any specific case.

With respect to the elements of the prima facie case laid out in *McDonnell Douglas*, the Court stated that the requirement that the plaintiff belong to a racial minority, "was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination."[20] If the Court had intended at that time to alter the prima facie case for reverse discrimination claimants, it could have easily done. However, it did not do so, and its statement above indicates that the only purpose of the first element is to establish that the claim is for discrimination on the basis of race, rather than sex or religion.

In a later case, the Court stated that:

> [a] prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. (citations omitted) And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.[21]

The Court's language is not limited to any particular racial group. Instead, it shows that, in a business setting, the Court will presume that the employer acted out of consideration of some illegitimate factor when no legitimate motivation can be found that will account for the action in question.

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18. *Id.* (quoting 110 CONG. REC. 2578 (1964) (remarks of Rep. Celler) (Title VII was intended to cover "white men and white women and all Americans"); 110 CONG. REC.7218 (1964) (memorandum of Sen. Clark) (Title VII creates an "obligation not to discriminate against whites")).

19. *Id.* at 280 n.8.

20. *Id.* at 279 n.6.

21. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

The Court also emphasized that the fulfillment of the prima facie case is not the equivalent of a factual finding of discrimination; it only gives rise to an inference of discrimination which can be rebutted.[22] Because of that inference, the defendant must be able to introduce evidence relevant to its motive. The Court found that, although statistical evidence cannot be determinative, a defendant may introduce statistical evidence showing a racially balanced workforce in order to show the lack of a discriminatory motive.[23]

The purpose of the *McDonnell Douglas* framework is to focus efficiently upon the question of discrimination.[24] The Court has emphasized that the burden of proving intentional discrimination rests at all times with the plaintiff.[25] However, the Court noted that the burden of establishing a prima facie case is "not onerous"; its purpose is to eliminate the most common causes for the rejection of the plaintiff.[26] To rebut the presumption, the defendant only must articulate a nondiscriminatory reason for its action. It does not have to persuade the court that it was actually motivated by that reason.[27] The purpose of the defendant's burden of production is to provide the plaintiff with sufficient information so that he or she may demonstrate pretext.[28] Once the defendant satisfies its burden of production, the inference created by the establishment of the prima facie case "drops from the case."[29] Nevertheless, if, after the plaintiff has established a prima facie case, the employer cannot articulate a legitimate, nondiscriminatory reason for its action, a court must enter judgment for the plaintiff.[30]

Another purpose of the *McDonnell Douglas* framework is to ensure that the plaintiff survives summary judgment and has an opportunity to prove his or her case in court "despite the unavailability of direct evidence."[31] If the plaintiff can present direct evidence of discrimination, the *McDonnell Douglas* framework is unnecessary. However, because it is difficult to prove intentional discrimination with only circumstantial evidence, the *McDonnell Douglas* framework is available to assist plaintiffs.[32]

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22. *Id.* at 579-80.

23. *Id.* at 580.

24. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

25. *Id.*

26. *Id.* at 253-54.

27. *Id.* at 254.

28. *Id.* at 255-56.

29. *Id.* at 256 n.10. The Court justified the imposition of such a light burden by the facts that the defendant's explanation must be clear and specific and that the defendant will have an incentive to present additional evidence in order to show that it was not motivated by discrimination.

30. *Id.* at 254.

31. Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985). The claim in *Thurston* was brought under the Age Discrimination in Employment Act, however, the *McDonnell Douglas* framework also applies in that context. *Id.*

32. *Id.*

The Court further elaborated upon the *McDonnell Douglas* standard in *St. Mary's Honor Center v. Hicks*.[33] In that case, the Court established the "pretext-plus" analysis.[34] The basic premise of the pretext-plus standard is that it is not enough for the plaintiff to show that the defendant's stated reason for the action was false. The plaintiff must also show that the real reason for the action was discrimination.[35] Thus, even if the plaintiff can show that the defendant put forth a false reason to explain the action, the plaintiff cannot prevail unless he or she can also show that the action was actually motivated by intentional discrimination. The plaintiff can satisfy the requirement using circumstantial evidence. Although the Court stated that the requirements of the prima facie case are "minimal,"[36] the plaintiff may present sufficient evidence to justify an inference of intentional discrimination.[37] However, in the vast majority of cases, the plaintiff must present evidence beyond that required to establish a prima facie case. *Hicks* thus reinforces the Court's earlier statements that the prima facie case does not establish discrimination. It is a tool designed to help the plaintiff, but the plaintiff must ultimately prove intentional discrimination to prevail.

The Court's decisions regarding affirmative action plans will also be helpful in determining the proper form of the prima facie case for reverse discrimination claims. With respect to voluntary affirmative action programs,[38] the Court decided that they are permissible if designed to remedy a "manifest racial imbalance" in "traditionally segregated job categories" if they do not "unnecessarily trammel" the interests of nonminorities.[39] The Court reasoned that such plans would provide minorities with access to positions which had traditionally been closed to them. Evidence of statistical disparity between the proportion of black workers in the local labor force and black workers in skilled positions within the company were sufficient for the Court to approve the plan.[40]

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33. 509 U.S. 502 (1993).

34. Some commentators consider *Hicks* a controversial decision. *See, e.g.*, Mark A. Schuman, *The Politics of Presumption:* St. Mary's Honor Center v. Hicks *and the Burdens of Proof in Employment Cases*, 9 ST. JOHN'S J. LEGAL COMMENT. 67 (1993) (describing the decision as "one of the most controversial decisions the Court handed down in . . . [the] 1992-93 term.").

35. *Hicks*, 509 U.S. at 511.

36. *Id.* at 506.

37. J. Hagood Tighe, *The Refined Pretext-Plus Analysis: Employees' and Employers' Respective Burdens After Hicks*, 46 S.C. L. REV. 333, 351 (1995). For example, in some extreme cases, it may be sufficient to show that the plaintiff was performing his or her job in a manner far superior to the performance of members of different groups and that only the plaintiff was fired.

38. For thorough discussions of the philosophy underlying affirmative action plans, see ALAN H. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION 65-140 (1979) (justifying affirmative action plans as "compensation for the past," but noting that those who benefit most from the programs will be those who have not been victims of discrimination in the past); KENT GREENWALT, DISCRIMINATION AND REVERSE DISCRIMINATION 49-84 (1983) (finding that a "simple racial criterion" may be most appropriate for manual labor jobs).

39. United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979).

40. *Id.* at 209; Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L.

However, the Court later reversed its reliance upon statistical disparities alone. In *Firefighters Local Union No. 1784 v. Stotts*,[41] the Court invalidated an affirmative action program adopted pursuant to a consent decree because "there was no finding that any of the blacks protected from layoff had been a victim of discrimination."[42] The Court changed its focus from the relative positions of minorities and nonminorities to the inequity of benefitting individuals who had not been victims of discrimination. Most recently, in *Adarand Constructors, Inc. v. Pena*, the Court ruled that affirmative action programs imposed by any governmental entity must pass strict scrutiny in order to be constitutional.[43] However, confusion still exists regarding the permissible scope of both voluntary and involuntary plans.[44]

The Court also removed procedural barriers that formerly made challenging affirmative action programs more difficult. In *Martin v. Wilks*, the Court granted white city employees the right to challenge a consent decree entered into by the city providing for affirmative action.[45] The decision allowed whites to challenge affirmative action programs pursuant to consent decrees when, despite an opportunity to do so, they did not intervene in the litigation in order to bring a reverse discrimination challenge. The case implies that reverse discrimination is a such a serious problem that it must be subject to challenges in court regardless of the lack of a history of discrimination against whites.[46]

II. THE CIRCUITS' APPROACHES TO REVERSE DISCRIMINATION

The federal courts have not been able to agree upon the correct formulation of the prima facie case for reverse discrimination claims. Although one circuit has stated that *McDonnell Douglas* does not apply in reverse discrimination cases, most circuits apply *McDonnell Douglas* in some form. Among circuits which apply *McDonnell Douglas*, two main views have developed as to the proper form of the prima facie case. They are (1) that a reverse discrimination plaintiff must demonstrate "background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against the majority,"[47] and (2) that a reverse discrimination plaintiff need only state class membership to fulfill the first element of the prima facie case. The difference

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REV. 1407, 1426 (1990).

41. 467 U.S. 561 (1984).

42. *Id.* at 579.

43. 515 U.S. 200, 227 (1995).

44. Steven G. Reade & Rosemary Maxwell, *Federal Affirmative Action Programs, Following* Adarand, *Are Being Revamped to Promote Diversity Through Measures that Don't Use Racial or Gender Preferences*, NAT'L L.J., Feb. 19, 1996, at B6. For instance, questions remain whether national findings of past discrimination or findings particular to industries or geographical areas are required, and whether gender-based preferences will be subjected to strict scrutiny. *Id.*

45. 490 U.S. 755, 762-63 (1989).

46. Freeman, *supra* note 40, at 1432.

47. Parker v. Baltimore & Ohio R.R Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981).

between the two views is due to divergent beliefs about the purpose of Title VII and the purpose of the presumption created by the prima facie case.

A. McDonnell Douglas *Does Not Apply*

In *Ustrak v. Fairman*, the Seventh Circuit held that the *McDonnell Douglas* framework does not apply to discrimination claims brought by nonminorities.[48] The court reasoned that the *McDonnell Douglas* method "is designed for the protection of minorities and women rather than of whites. Racial discrimination against whites is forbidden, it is true, but no presumption of discrimination can be based on the mere fact that a white is passed over in favor of a black."[49] However, this conclusion is contrary to the Supreme Court's holding in *McDonald*, that Title VII applies to protect whites "upon the same standards" as it protects minorities.[50] The *Ustrak* court did not acknowledge the Supreme Court's language in this respect.

Contrary to *Ustrak*, the *McDonnell Douglas* framework should apply to reverse discrimination cases for several reasons. First, the Court had already established the burden-shifting framework at the time it decided *McDonald* and did not strike it down in *McDonald*. When *McDonald* was decided, the burden-shifting framework was the only established standard for proving intentional discrimination with circumstantial evidence. In fact, in *McDonald*, the Court referred to the framework, stating that the first element did not indicate any substantive limitation upon the reach of Title VII.[51] Second, the Court explicitly allowed majority plaintiffs to use the *McDonnell Douglas* framework in a case involving a challenge to an affirmative action plan.[52] Thus, the *McDonnell Douglas* framework applies in reverse discrimination cases. No court has agreed with the Seventh Circuit's refusal to apply the framework, and the Seventh Circuit itself later applied *McDonnell Douglas* in a reverse discrimination case while expressly declining to decide whether it is properly applied to such a case.[53]

B. McDonnell Douglas Does Apply

The vast majority of courts have held that *McDonnell Douglas* applies to reverse discrimination cases. However, these courts do not agree upon the proper form of the prima facie case. The disagreement centers around the first element. The District of Columbia, Sixth and Tenth Circuits require a reverse discrimination plaintiff to show background circumstances indicating that the defendant discriminates against majority groups. The plaintiff must make that

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48. 781 F.2d 573, 577 (7th Cir. 1986).

49. *Id.*

50. McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 280 (1986).

51. *Id.* n.8; *see supra* note 20 and accompanying text.

52. Johnson v. Transportation Agency, 480 U.S. 616, 642 (1987).

53. Pilditch v. Board of Educ., 3 F.3d 1113, 1116 (7th Cir. 1993); *see infra* note 73 and accompanying text.

showing in lieu of the statement that he is a member of a minority group. The Fourth, Fifth, Eighth and Eleventh Circuits and some district courts do not require additional proof for reverse discrimination plaintiffs. The plaintiff need only state class membership to fulfill the first element of the prima facie case.

1. The Requirement of "Background Circumstances."—In 1981, the United States Court of Appeals for the District of Columbia Circuit decided *Parker v. Baltimore and Ohio Railroad Co.*[54] In that case, a white railroad employee sued under Title VII for discrimination because the railroad failed to promote him.[55] The court ruled that a majority claimant may use the *McDonnell Douglas* framework to prove intentional discrimination when "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority."[56] Under this test, a majority plaintiff must show background circumstances in lieu of the requirement that he or she be a member of a minority group.[57]

The court reasoned that the *McDonnell Douglas* test is "not an arbitrary lightening of the plaintiff's burden, but rather a procedural embodiment of the recognition that our nation has not yet freed itself from a legacy of hostile discrimination."[58] Therefore, the presumption exists for minorities and women only because of the history of societal discrimination that we have yet to overcome. However, in a case brought by a majority plaintiff, the factors which establish a prima facie case under *McDonnell Douglas* give rise to a presumption of discrimination only if background circumstances indicate a reason for such a presumption. The court acknowledged that whites are a protected group under Title VII but stated that "it defies common sense" to suggest that an inference of discrimination should arise from the fact that a minority was hired or promoted instead of a white.[59] According to the court,

> Membership in a socially disfavored group was the assumption on which the entire *McDonnell Douglas* analysis was predicated, for only in that context can it be stated as a general rule that the "light of common

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54. 652 F.2d 1012 (D.C. Cir. 1981).

55. The plaintiff's repeated efforts to obtain a promotion to the position of locomotive firemen were thwarted, and minorities and women were frequently chosen to fill the positions. The defendant company acknowledged the existence of an affirmative action program designed to increase participation of women and minorities. *Id.* at 1015-16.

56. *Id.* at 1017. *Accord* Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993); Bishopp v. Dist. of Columbia, 788 F.2d 781 (D.C. Cir. 1986); Martin-Trigona v. Board of Trustees, 668 F. Supp. 682 (D. D.C. 1987); Dougherty v. Barry, 607 F. Supp. 1271 (D. D.C. 1985).

57. *Id.* at 1018. The court cited as support for its ability to modify the framework the Supreme Court's statement in *McDonnell Douglas* that the prima facie case would require modification to fit specific factual situations. For instance, the elements may be somewhat different in cases of discriminatory refusals to hire and cases of discriminatory refusal to promote. *Id.* at 1017.

58. *Id.* at 1017.

59. *Id.*

experience" would lead a factfinder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member.[60]

The court recognized that background circumstances sufficient to give rise to an inference of discrimination would include proof that the defendant company had unlawfully considered race as a factor in its employment and promotion decisions in the past.[61] However, courts requiring background circumstances, even those within the District of Columbia, have been unable to establish uniform standards that will meet the requirement.

In a later District of Columbia reverse discrimination case, the court upheld the *Parker* background circumstances requirement, with different factors making up the test. In *Bishopp v. District of Columbia*,[62] several white plaintiffs claimed racial discrimination in failure to promote them to the position of Assistant Fire Chief when a black was promoted instead. The court restated the rule announced in *Parker*. It required white males claiming racial discrimination to show "particularized evidence, apart from their race and sex, that suggests some reason why an employer might discriminate against them."[63] The court found that the plaintiffs had presented a strong prima facie case.[64] The case which the court in *Bishopp* found sufficient to establish background circumstances included the facts that (1) both of the plaintiffs' superiors who would choose the new Assistant Fire Chief were black, (2) an affirmative action plan was being drafted at the time of the decision, and (3) there was evidence of political pressure to hire a black to fill the position.[65] The court did not specify the weight it assigned to each of these facts; it only stated that the three facts together made a strong case of discriminatory intent.[66] The court acknowledged that the fact that the plaintiffs' superiors were black was weak evidence of discriminatory intent.[67] Therefore, the court either considered the drafting of the affirmative action plan

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60. *Id.*

61. *Id.* at 1018.

62. 788 F.2d 781 (D.C. Cir. 1986).

63. *Id.* at 786.

64. *Id.* The lower court disagreed, finding that the plaintiffs had only established a prima facie case because the defendants had conceded it. The concurring justice agreed largely with the lower court. *Id.* at 790-92 (Wald, J., concurring).

65. *Id.* at 787.

66. Keith Beauchamp, *Employment Discrimination—Title VII*, 55 GEO. WASH. L. REV. 845, 854 (1987). The court did state, however, that the fact that a plaintiff's superiors are black will not be sufficient alone in a reverse discrimination case to establish background circumstances showing that the employer discriminates against the majority. *Bishopp*, 788 F.2d at 788 n.7 (citing Plummer v. Bolger, 559 F. Supp. 324 (D.D.C.), *aff'd without opinion*, 721 F.2d 1424 (D.C. Cir. 1983)). The court also stated that "it is not clear whether a lawful, promulgated affirmative action plan can nonetheless provide a link in a prima facie case that would justify the inference of discrimination." *Id.* at 784 n.3. However, clearly the court used the fact that a plan was being drafted as a link in the prima facie case.

67. *Bishopp*, 788 F.2d at 787.

as evidence of discriminatory intent or placed heavy emphasis upon disputed evidence of political pressure to hire a black.[68] Either way, the case shows the uncertainty of the factual showing sufficient to meet the requirement of background circumstances. Although the court stated that the plaintiffs established a strong prima facie case, the three factors enumerated above do not meet the requirement established in *Parker*, that the plaintiff show the defendant has used race as a criterion for decision making in the past.

The Sixth and Tenth Circuits have followed the District of Columbia's example and explicitly adopted the background circumstances requirement in reverse discrimination cases. The Sixth Circuit reasoned that the *McDonnell Douglas* framework "stems from Congressional efforts to address this nation's history of discrimination against racial minorities, a legacy of racism so entrenched that we presume acts, otherwise unexplained, embody its effects." [69] The reasoning is similar to the *Parker* court's reasoning. Because discrimination against blacks is so prevalent in society, blacks are entitled to a presumption that a decision was motivated by race. Because nonminorities have not been subjected to such prevalent discrimination, they must prove more to justify the presumption. However, in its most recent case on the subject, the Sixth Circuit expressed doubts about imposing more onerous requirements upon majority plaintiffs to establish a prima facie case.[70]

In *Logan v. Express, Inc.*,[71] the male plaintiff claimed that his discharge from a managerial position was due to reverse sex discrimination. The evidence revealed that Express stated that it feared a male might make the largely female clientele uncomfortable and that it wanted female salespersons in the clothing store. The Sixth Circuit found these statements insufficient to establish background circumstances where the former, but not the latter, statement was made eight years prior to the plaintiffs's discharge.[72] The Sixth Circuit has never articulated the facts necessary to meet the background circumstances

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68. Beauchamp, *supra* note 66, at 856. The evidence of political pressure was not accepted by the district court, but was credited by the Court of Appeals. *Id.*

69. Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985) (citing Furnco Constr. v. Waters, 438 U.S. 567, 577 (1978)). The Tenth Circuit Court of Appeals has also adopted the requirement of a showing of background circumstances indicating discrimination for majority plaintiffs. Notari v. Denver Water Dep't, 971 F.2d 585, 588-89 (10th Cir. 1992). The Tenth Circuit reasoned that "the presumptions in Title VII analysis that are valid when a plaintiff belongs to a disfavored group are not necessarily justified when the plaintiff is a member of an historically favored group." *Id.* at 589 (quoting Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986)). *Accord* Rhoads v. Wal-Mart Stores, Inc., No. 95-1313, 1996 WL 194854, at *1 (10th Cir. Apr. 23, 1996); Sims v. KCA, Inc., No. 93-2053, 1994 WL 266744, at *3 (10th Cir. June 17, 1994).

70. Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) ("We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts.").

71. No. 92-4363, 1993 WL 515492 (6th Cir. Dec. 10, 1993).

72. *Id.* at *3.

requirement. However, the facts in *Logan* seem to lead naturally to a suspicion that the defendant had used gender as a basis for decision making in the past, and thus the plaintiff would have fulfilled the requirement as enunciated in *Parker*.

The reasoning adopted by the District of Columbia, Sixth, and Tenth and Circuits shows that the additional requirement for a majority plaintiff in a reverse discrimination case is due to a belief that the presumption established by the *McDonnell Douglas* prima facie case exists solely because of the race or gender of the plaintiff. That is, the presumption exists for minorities and women because historically they have been victims of discrimination and thus, in the absence of another explanation, the presumption that they continue to be the victims of discrimination is justified. Whereas, in the case of majority and male plaintiffs, the inference is not justified, because in the past, such persons have not generally been victims of discrimination. Although these courts agree upon the reasoning behind the background circumstances requirement, they do not agree upon what particular facts should meet that requirement.

However, many courts have not adopted the background circumstances requirement in reverse discrimination cases. These courts have taken three different approaches: (1) The Fourth and Seventh Circuits have avoided deciding the issue because the cases presented to them did not require the resolution of the question; (2) the Fifth and Eleventh Circuits decided reverse discrimination cases without mention of the additional requirement; and (3) two district courts have sharply criticized the background circumstances requirement. These courts allowed reverse discrimination plaintiffs to fulfill the first element of the prima facie case by stating class membership.

2. "Background Circumstances" Avoided.—The Seventh and Fourth Circuits have refused to decide whether background circumstances are necessary. For instance, the Seventh Circuit, after first finding that the *McDonnell Douglas* framework would not apply to reverse discrimination cases,[73] decided a reverse discrimination case by removing the first element from the prima facie case altogether.[74] The court noted that in the latter case, the result would be the same whether or not the additional showing was required because the defendant had advanced a legitimate, nondiscriminatory reason for the failure to renew a teacher's contract; thus the *McDonnell Douglas* framework became irrelevant. The court required the plaintiff to show only that he was meeting the employer's legitimate expectations, that he was qualified for the job, that he was not rehired, and that he was replaced by a person of a different race.[75]

Similarly, the Fourth Circuit refused to decide whether a showing of background circumstances was necessary in a reverse discrimination claim. In *Lucas v. Dole*,[76] a white employee alleged racial discrimination. The court noted that the case differed from the usual *McDonnell Douglas* case because the

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73. *Ustrak*, 781 F.2d 577; *see supra* note 47 and accompanying text.

74. Pilditch v. Board of Educ., 3 F.3d 1113, 1116 (7th Cir. 1993).

75. *Id.*

76. 835 F.2d 532 (4th Cir. 1987).

position sought by the plaintiff did not remain open after she was rejected. In such a case, the Fourth Circuit requires the plaintiff to produce "'some other evidence that [her] race was a factor considered by [her] employer in not granting [her] the promotion.'"[77] In this case, the plaintiff was required to make a showing similar to that which would be required by the background circumstances standard. However, that showing was required by a different rule. Nevertheless, the court stated, "we expressly decline to decide at this time whether a higher burden applies."[78]

The Seventh and Fourth Circuits avoided the difficult question of whether reverse discrimination plaintiffs must make an additional showing to establish a prima facie case. The issue is a difficult one because some courts have viewed the presumption established by the prima facie case as a reflection upon predominant attitudes in society. By relying upon the structure of the framework, i.e. the fact that the presumption drops from the case when the employer articulates a nondiscriminatory reason for its action, the Seventh Circuit avoided what might be viewed as a statement about the nature of society. The Fourth Circuit accomplished the same result by relying on another rule peculiar to its jurisdiction. They were able to avoid the question only because the particular cases before them presented special circumstances. Because they acknowledged the issue at all, they will eventually have to decide whether reverse discrimination plaintiffs must meet an additional requirement to establish a prima facie case.

3. "Background Circumstances" Not Required.—Other courts have decided reverse discrimination cases without even mentioning the requirement of background circumstances which indicate discrimination. The Eleventh Circuit stated the first element of the prima facie case for a reverse discrimination plaintiff as proof "that he belongs to a class."[79] The Fifth Circuit also decided a reverse discrimination case without mention of background circumstances. It stated that, to fulfill the first element of the prima facie case, a reverse discrimination plaintiff only need show that "he belongs to a protected class."[80]

4. "Background Circumstances" Criticized.—Still other courts have overtly rejected the background circumstances requirement. In *Collins v. School District of Kansas City*, the court allowed a reverse sex discrimination plaintiff to attempt to prove a prima facie case without a showing of background circumstances.[81]

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77. *Id.* at 533 (quoting Holmes v. Bevilacqua, 794 F.2d 142, 147 (4th Cir. 1986)).

78. *Id.* at 534.

79. Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991). In this case, the plaintiffs successfully established a prima facie case, as conceded by the defendants.

80. Young v. City of Houston, 906 F.2d 177, 180 (5th Cir. 1990). The Supreme Court established in *McDonald* that whites are a protected class under Title VII. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 280 (1986). The plaintiff in *Young* did not attempt to establish a prima facie case. Instead, he produced evidence of the use of racial epithets such as "white token" and "white faggot." The court found that such racial epithets constitute direct evidence of race discrimination. *Young*, 906 F.2d at 180.

81. 727 F. Supp. 1318, 1322 (W.D. Mo. 1990) (Plaintiff was able to establish a prima facie

The court cited the Supreme Court's decision in *Griggs v. Duke Power Co.*[82] for the proposition that "[d]iscriminatory preference for any group, minority or majority, is precisely . . . what Congress has proscribed."[83] According to the district court, the *McDonnell Douglas* framework was intended to "'bring the litigants and the court expeditiously and fairly' to the ultimate question of whether the defendant intentionally discriminated against the plaintiff in violation of Title VII."[84]

The court in *Collins* disagreed with the reasoning supporting background circumstances, that membership in a disfavored group is the assumption underlying the *McDonnell Douglas* framework. Instead, the court stated that "[t]he *McDonnell Douglas* framework was a procedural embodiment of the recognition that employment discrimination is difficult to prove with only circumstantial evidence."[85] According to the *Collins* court, the framework exists because plaintiffs rarely have direct evidence of discriminatory intent. In the absence of direct evidence, plaintiffs will be forced to rely upon circumstantial evidence, which imposes a heavy burden upon plaintiffs. To alleviate the extreme difficulty of proving intentional discrimination with circumstantial evidence, the framework is used to create a presumption which is intended "to force the employer to come forward with a legitimate explanation for his conduct."[86]

To support that position, the *Collins* court cited the Supreme Court's statement that the *McDonnell Douglas* framework was intended to be flexible.[87] Permissible changes are not limited to changes that reflect different employment actions.[88] In a reverse discrimination claim, the first element can be changed to require a mere statement of class membership.

The court also noted that the framework,

> is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons,

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case because, outside of its challenge to the appropriate legal standard, defendant conceded the issue.). The Eighth Circuit has not decided the issue.

82. 401 U.S. 424 (1972).

83. *Collins*, 727 F. Supp. at 1319 (quoting *Griggs*, 401 U.S. at 429).

84. *Id.* at 1319-20 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

85. *Id.* at 1321.

86. *Id.* at 1322.

87. *Id.*

88. *See infra* note 127 and accompanying text.

> especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.[89]

The fact that the plaintiff is a member of a majority group does not change the inference.[90] It is just as likely that an improper consideration such as race motivated the decision to reject a majority plaintiff as a minority plaintiff when the employer is unable to articulate a nondiscriminatory reason for his or her conduct.[91]

The court in *Collins* also argued that the background circumstances requirement undermines the purposes of *McDonnell Douglas* because it forces the majority plaintiff to make a showing on the ultimate issue of the case, discrimination, in order to establish a prima facie case.[92] *McDonnell Douglas* established a test that explicitly relieved plaintiffs of such a burden. According to *Collins*, requiring background circumstances shifts the entire burden to the plaintiff at the phase of the prima facie case, and such a radical departure from the *McDonnell Douglas* framework cannot be justified by the Supreme Court's recognition that the proof necessary to establish a prima facie case will vary with different factual situations.[93] Courts which require background circumstances believe that recognition justifies the imposition of a heavier substantive burden. The *Collins* court, however, recognized that the Court merely acknowledged that the prima facie case would be applied to different situations such as discharge, failure to promote, and failure to hire. Therefore, the *Collins* court rejected the requirement of background circumstances and allowed the plaintiff to meet the first element of the prima facie case by merely stating his gender.

Another district court criticized the background circumstances requirement, refusing to impose a higher standard upon reverse discrimination claimants. The court stated that "[t]he principal focus of the statutes is the protection of the individual employee, rather than the protection of the protected group as a whole."[94] Implicit in the court's statement is the view, similar to that expressed in *Collins*, that the higher burden imposed by the background circumstances

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89. *Collins*, 727 F. Supp. at 1322 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

90. *Id.* at 1321.

91. *Id.*

92. *Id.*

93. *Id.* The court in *Parker* relied upon the Supreme Court's statement that the test laid out in *McDonnell Douglas* would not necessarily apply in every case. Parker v. Baltimore & Ohio R.R. Co., 652 F.2d at 1017.

94. Ulrich v. Exxon Co., 824 F. Supp. 677, 684 (S.D. Tex. 1993). The plaintiff in that case was not able to establish a prima facie case of race discrimination because the only evidence was his own deposition testimony that minorities with lesser qualifications were promoted ahead of him. *Id.* at 684, 686.

requirement forces a reverse discrimination claimant to prove discrimination against the entire class of which he or she is a member. Thus, if reverse discrimination plaintiffs must demonstrate background circumstances indicating discrimination, Title VII only protects whites and males as groups, rather than as individuals. Only when the entire group has been subjected to discrimination can an individual recover. The court further pointed to the Supreme Court's decision that the *McDonnell Douglas* analysis applied to a reverse discrimination claim involving a challenge to a voluntary affirmative action plan.[95]

In sum, the courts which explicitly reject the background circumstances requirement assume that the *McDonnell Douglas* framework exists because it is difficult to prove discrimination in the absence of direct evidence. Therefore, any plaintiff, regardless of class membership, should be able to establish a prima facie case without showing background circumstances that indicate discrimination. In the view of these courts, the additional requirement is onerous and unjustifiably limited to majority plaintiffs. It also imposes the burden of proving intentional discrimination upon the plaintiff before the employer is required to articulate a nondiscriminatory reason for the action at issue. Furthermore, the plaintiff is forced to prove discrimination against other members of his or her class. Therefore, these courts require no additional showing from reverse discrimination plaintiffs.

III. ANALYSIS

The Court should not require reverse discrimination plaintiffs to demonstrate background circumstances indicating discrimination. This section analyzes the Court's approach to discrimination from several viewpoints. First, in light of the Court's statements about the purpose of the *McDonnell Douglas* framework, the requirement should not be imposed. Second, the requirement is inconsistent with the purposes of the prima facie case. Third, the requirement is unnecessary in view of the Court's most recent modification of the framework. Fourth, it is inconsistent with the Court's general approach to Title VII and affirmative action cases. Therefore, the Court should not require reverse discrimination plaintiffs to demonstrate background circumstances.

A. The Purpose of the Framework

One issue that divides the courts in deciding whether a reverse discrimination plaintiff must make an additional showing is the purpose of the *McDonnell Douglas* framework. While some believe that the burden-shifting method is a procedural device designed to ease the burden on the plaintiff who often has only circumstantial evidence with which to prove intentional discrimination,[96] others believe that the framework reflects the fact that our society has not yet freed

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95. *Id.* at 684 (quoting Johnson v. Transportation Agency, 480 U.S. 616, 626 (1987)).

96. *Collins*, 727 F. Supp. at 1321; *Ulrich*, 824 F. Supp. at 683 (characterizing the additional requirement as an "arbitrary barrier"); *see supra* note 85 and accompanying text.

itself from a legacy of discrimination on the basis of race and sex.[97] The Court has provided insight into the purpose of the framework in several cases.

In *Texas Department of Community Affairs v. Burdine*, the Court stated that the framework is designed to focus litigation efficiently upon the central question, discrimination, even in the absence of direct evidence.[98] Later, in *Trans World Airlines v. Thurston*, the Court articulated the framework's purpose as helping the plaintiff survive summary judgment so that he or she has an opportunity to prove the case in court despite the absence of direct evidence.[99] Because these two comments were made in race-neutral language, without any limitation relating to the race or gender of the plaintiff, and demonstrate the purely procedural value of the framework, they show that the Court views the framework as a procedural device, rather than as any reflection upon society in general.

The requirement of background circumstances undermines the purposes which the Court has articulated.[100] By placing upon the plaintiff the burden of showing background circumstances at the outset, courts prevent the effective functioning of one of the Court's recognized purposes in establishing the framework. That purpose is to force the defendant to come forward with a legitimate, nondiscriminatory reason for its actions.[101] If the reverse discrimination plaintiff lacks direct evidence and cannot show past discrimination against members of his or her class, the employer is never forced to justify its actions, and may escape liability even if it has intentionally discriminated against the plaintiff.[102] Furthermore, in courts that require a showing of background circumstances, a plaintiff who does not have direct evidence of discrimination is denied the opportunity to show discrimination in this particular case through circumstantial evidence unless members of his or her class have been victims of discrimination by the defendant in the past or unless the plaintiff can prove one of the other formulations which establish background circumstances.[103] It is certainly possible that an individual plaintiff can be a victim of discrimination although the defendant did not discriminate against members of the plaintiff's class in the past. Courts which require background circumstances do not recognize this possibility.

Requiring a showing of background circumstances also undermines the purposes of *McDonnell Douglas* by forcing the reverse discrimination plaintiff

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97. Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985); Bishopp v. Dist. of Columbia, 788 F.2d 781, 786 (D.C. Cir. 1986); Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1017 (6th Cir. 1985).

98. 450 U.S. at 253-54.

99. 469 U.S. at 121.

100. *Collins*, 727 F. Supp. at 1321; *see supra* note 85 and accompanying text.

101. *Burdine*, 450 U.S. at 254.

102. *Collins*, 727 F. Supp. at 1321.

103. *See* Ulrich v. Exxon Corp, 824 F. Supp. 677, 684 (S.D. Tex. 1993) (stating that the additional requirement undermines the statute's focus upon the individual rather than the group); *see also supra* Part II.B.1.

to prove discrimination at the outset.[104] The framework is designed to assist the plaintiff by creating a presumption of discrimination despite the fact that the plaintiff has not actually proven discrimination. The reverse discrimination plaintiff must come much closer to proving discrimination than members of historically disadvantaged groups. In effect, the reverse discrimination plaintiff must justify the presumption where a minority plaintiff need not do so. The reverse discrimination claimant does not receive the benefits of surviving summary judgment and receiving his or her day in court that are granted to minority claimants. Courts which advocate the additional requirement provide no reason to justify the denial of an opportunity to prove intentional discrimination against the individual plaintiff.

Furthermore, the facts which the courts have found necessary to fulfill the background circumstances requirement are similar to those which the Court recognized as relevant to pretext in *McDonnell Douglas*.[105] Those facts include a pattern of discrimination against the members of the plaintiff's class, precisely the fact which the *Parker* court recognized as necessary to show background circumstances indicating a reason for a presumption of discrimination. In *McDonnell Douglas*, the Court also recognized that statistics showing a pattern of discrimination against the plaintiff's class may be relevant but not controlling.[106]

However, in a reverse discrimination case, the fact that statistics showing a pattern of discrimination may be considered necessary to the establishment of a prima facie case means that they are controlling in a case in which the plaintiff does not have direct evidence of discrimination. The plaintiff cannot proceed beyond the prima facie stage without such evidence. Thus, the reverse discrimination plaintiff is forced to make a factual showing which the Court has specifically stated is relevant to pretext at the prima facie stage of the litigation. A minority plaintiff does not have to make that showing to receive the benefit of the presumption. When a summary judgment motion is filed and the reverse discrimination plaintiff cannot show background circumstances indicating discrimination, the defendant is not forced to meet the relatively light burden of putting forth a nondiscriminatory reason for his action, and the plaintiff loses the opportunity to prove the case in court.

The courts have continually added confusion to the issue of the factual showing necessary to establish the background circumstances requirement. The *Bishopp* court stated three facts which it found together made up a strong showing of background circumstances indicating discrimination.[107] None of the three facts amounted to a showing of a pattern of past discrimination against members of the plaintiff's class, which the same court required in *Parker*.

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104. *Id.*

105. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973); *see supra* note 11 and accompanying text.

106. *Id.* at 805 n.19.

107. Bishopp v. Dist. of Columbia, 788 F.2d 781, 787 (D.C. Cir. 1986); *see supra* note 64 and accompanying text.

Furthermore, each of the three facts which the *Bishopp* court found made up a strong prima facie case had been in some way discredited by the court.[108] Thus, the District of Columbia Circuit has not established a concrete standard to guide plaintiffs in fulfilling the requirement.

In *Murray v. Thistledown Racing Club*, the plaintiff was not able to show background circumstances supporting the suspicion that the defendant discriminated against the majority.[109] The court did not clarify the facts that would have fulfilled the requirement. It only stated that the facts that no affirmative action program existed and that the majority of the employees holding the same position as the plaintiff were members of the same class as the plaintiff meant that she had not fulfilled the requirement.[110] The court did not state that these facts will always be either necessary or sufficient to fulfill the requirement.

Moreover, in *Logan v. Express, Inc.*, the court also failed to state what kind of factual showing will establish background circumstances indicating discrimination against the plaintiff's class. It appears that the plaintiff attempted to show a pattern of discrimination by the defendant against males. The court found the facts insufficient to establish background circumstances but did not state what might have been sufficient.[111] It is not clear whether the court found that a showing of past discrimination will not establish background circumstances or that the proof presented by the plaintiff in that case was not sufficient to establish a pattern of past discrimination. Regardless, even though the plaintiff was able to meet the other three elements of the prima facie case, the proof was not sufficient to allow him to survive the summary judgment stage of litigation. That result runs contrary to one of the stated purposes of the *McDonnell Douglas* framework.

The factual showing necessary to meet the requirement of background circumstances is unclear; it changes with each individual case and the individual judges deciding each case. This leaves open the possibility that a court may choose whether or not to find the requirement fulfilled depending upon its belief about the merit of the reverse discrimination plaintiff's claim. This possibility of abuse by the judge could be seriously detrimental to the reverse discrimination claimant's possibility of success. Not only will a reverse discrimination claimant often be denied the procedural benefits of the *McDonnell Douglas* framework, but the decision whether the claimant receives those benefits will be subject to the virtually unbridled discretion of the individual judge deciding the case. While judges are generally fair people, even judges may not be able to overcome their own views on a subject as controversial and divisive as race and sex discrimination. Those views are likely to affect a judge's perception of the merits of a reverse discrimination claim. Thus, to protect the reverse discrimination claimant from the judge's view of society and discrimination, the

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108. *Id.* at 784; Beauchamp, *supra* note 66 and accompanying text.

109. 770 F.2d 63, 68 (6th Cir. 1985).

110. *Id.*

111. No. 92-4363, 1993 WL 515492, at *3 (6th Cir. Dec. 10, 1993).

additional requirement should not be imposed upon reverse discrimination claimants.

Moreover, the lack of clear standards poses difficulty for employers trying to establish policies in the workplace. At least two courts have implied that proof of the existence or drafting of an affirmative action program may partially fulfill the background circumstances requirement.[112] The fact that such programs may help reverse discrimination plaintiffs establish a prima facie case may discourage employers from using them, even in their milder forms. A clearly established standard for the additional requirement would assist employers in policymaking. However, removing the additional requirement altogether will be even more beneficial to employers because their past actions will not be taken into account in a reverse discrimination case. The question in each case will remain whether the employer discriminated against the individual employee who brought the case.

The purposes of the framework are not fulfilled by the imposition of the requirement of background circumstances indicating discrimination. The plaintiff is required to show discrimination by the defendant against members of his class generally, and the plaintiff must do so at the prima facie stage in order to receive the stated benefits of the burden-shifting test. Moreover, no court has clearly and consistently articulated the kind of factual showing which will meet the requirement. That leaves reverse discrimination plaintiffs in a difficult situation, at the mercy of a trial judge who may decide whether the burden has been met without any standard to guide that decision. Furthermore, employers will benefit from the removal of the additional requirement because the litigation will remain focused upon the question of discrimination against the individual plaintiff, rather than employers' actions in any other context.

B. The Purpose of the Prima Facie Case

The issue which most divides the courts in deciding the proper form of the prima facie case in reverse discrimination claims is the reasoning behind the presumption created by the prima facie case.[113] The courts are divided based upon the same reasoning which divides the courts about the framework in general. Courts which require a showing of background circumstances reason that the presumption exists only because of the history of discrimination against women and minorities. Thus a reverse discrimination claimant cannot receive the benefit of the presumption in the absence of a showing of a history of

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112. *Bishopp*, 788 F.2d at 787; *Murray*, 770 F.2d at 67.

113. For criticism of the presumption, see Tighe, *supra* note 37, at 337 (finding that "the McDonnell Douglas presumption is based, not upon the accumulation of experience of the coincidence of one set of facts with another, but upon an ideology which posits that relationship without proof. . . . The application of the presumption is a political decision intended to affect out-of-court behavior, in this case by punishing the failure to favor those in a 'protected' class in employment decisions.").

discrimination by the defendant.[114] Courts which impose no additional requirements upon reverse discrimination claimants consider the presumption a procedural device designed to help the plaintiff who has only circumstantial evidence of discrimination.[115] In order to receive the benefit of the presumption, a reverse discrimination claimant need only meet the same elements that a member of a historically disadvantaged group must meet.

The purpose of the prima facie case is to assist plaintiffs who do not have direct evidence of discriminatory intent. In *United States Postal Service Board of Governors v. Aikens*,[116] the Court stated that the presumption exists because "[t]here will seldom be 'eyewitness' testimony to the employer's mental process."[117] Furthermore, in *Burdine*, the Court stated that the prima facie case is designed to eliminate the most common, nondiscriminatory reasons for the employer's actions.[118] The presumption does not arise merely because of the plaintiff's race or gender, rather, it arises because intentional discrimination is difficult to prove and because no ordinary and legitimate reason for the action exists. If the plaintiff cannot eliminate the common reasons such as inadequate job performance or lack of sufficient credentials to qualify for the job, no presumption arises regardless of the race or gender of the plaintiff.

When a reverse discrimination plaintiff eliminates the most common reasons for the action, the presumption is as justified as when it occurs in the case of a minority or female plaintiff because the reasoning behind the presumption is the apparent lack of a legitimate reason for the action, not the race or gender of the plaintiff. This conclusion is supported by the fact that the defendant has the opportunity to explain his actions. Furthermore, the burden imposed upon the defendant to rebut the presumption is light. The defendant only has to articulate a nondiscriminatory reason; it need not persuade the court that the reason provided was the actual reason for the action.[119] Thus, although a presumption is created, it is a presumption which is easily rebutted in the absence of intentional discrimination. That is true for a reverse discrimination claim as well as for a claim brought by a member of a historically disadvantaged group. Therefore, no additional requirement should be imposed upon a reverse discrimination claimant.

Courts which require background circumstances cite *Furnco* for support. In that case, the Court stated that the presumption arises as a result of the prima facie case because "in light of common experience" employers only act with

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114. 770 F.2d at 67; 788 F.2d at 786; Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981); *see supra* note 53 and accompanying text.

115. Collins v. School Dist., 727 F. Supp. 1318, 1321 (W.D. Mo. 1990); Ulrich v. Exxon Corp., 824 F. Supp. 677, 683 (S.D. Tex. 1993) (characterizing the additional requirement as "an arbitrary barrier"); *see supra* note 79 and accompanying text.

116. 460 U.S. 711 (1983).

117. *Id.* at 716.

118. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

119. *Id.* at 255.

some reason.[120] If no legitimate reason for the action can be found, then the court will presume a discriminatory reason. The courts which require background circumstances argue that the presumption is justified in light of common experience only when the plaintiff is a member of a historically disadvantaged group. Those courts fail to acknowledge two facts.

First, discrimination against minorities and women is decreasing in society.[121] Courts which advocate the additional requirement do not articulate the point at which the presumption ceases to be valid for minorities and women. If the presumption rests upon the fact that these groups are frequently victims of discrimination, courts advocating that rationale must draw a line. There must be a point at which the presumption is no longer valid because the group members are no longer the most frequent victims of discrimination. However, courts are not in a position to make judgments about trends in society generally; courts focus upon individual cases.[122] Therefore, to avoid an inappropriate judicial determination which is necessary to the rational operation of the background circumstances requirement, courts should not impose the requirement.

Second, imposing a higher standard upon reverse discrimination plaintiffs is fundamentally unjust. It is true that minorities and women have been subjected to discrimination on a massive scale. That fact does not, however, justify the imposition of a much higher standard upon other groups. The reverse discrimination plaintiff, who may bear absolutely no personal responsibility for discrimination against minorities and women, must meet a much higher burden because members of the same group have discriminated in the past. The value of Title VII and other antidiscrimination legislation is the prevention of discrimination. Title VII defines discrimination as treating employees differently "because of" the protected characteristics.[123] Yet courts which impose the background circumstances requirement treat reverse discrimination plaintiffs differently "because of" those very characteristics. In the interests of justice and the spirit of Title VII, the Court should not impose the background circumstances requirement.

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120. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

121. PHILLIP PERLMUTTER, DIVIDED WE FALL: A HISTORY OF ETHNIC, RELIGIOUS, AND RACIAL PREJUDICE IN AMERICA 307 (1995) (finding a "steady decrease in religious, racial and ethnic discrimination . . . ."); *A Hopeful Check on Ethnic Prejudice*, CHICAGO TRIB., Jan. 15, 1992, at 12; *see also Real Racial Progress*, AUSTIN AM. STATESMAN, Nov. 19, 1996, at A10 (finding that ascending income and education levels among minorities will result in a decrease in racism); *Single, Salaried Women Are Buying Homes at a Record Pace*, ABOUT WOMEN & MARKETING, June 1, 1996, at 15 (finding that women are now able to buy their own homes more frequently because of a decrease in lending discrimination); Jeff Rowe, *Wage Gap Narrowing, Study Says*, THE ORANGE COUNTY REG., Apr. 13, 1995, at A7 ("Pay gaps between men and women have practically disappeared in some occupations . . . .").

122. *See* Donald H. Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 BUFF. L. REV. 871, 876-77 (1986) (finding that the "transactional justice" view, which values the rights of individuals, is a dominant theme in American law).

123. 42 U.S.C. § 2000e-2(a) (1994).

Courts which require background circumstances also ignore the fact that the establishment of a prima face case creates only a presumption of discrimination. A presumption is not equivalent to a factual showing of discrimination.[124] The burden of actually showing intentional discrimination remains at all times with the plaintiff.[125] As long as the defendant is able merely to point out some legitimate reason for the action, the presumption drops from the case.[126] Thus, an additional showing to establish a presumption that is so easily rebutted and which is necessary to continue litigation is unjustifiable.

Courts requiring background circumstances also rely upon the Court's statement that the proof necessary to establish a prima facie case will vary with different factual situations.[127] However, that statement also does not justify imposing an additional burden upon certain plaintiffs because of their class membership. Rather, the more likely interpretation is that the Court recognized that the framework would be applied to different employment actions, such as refusal to hire, refusal to promote, and discharge. Thus, different formulations of the second and third elements of the prima facie case are used. In *McDonnell Douglas*, a case involving discriminatory failure to hire, the Court required a showing that the plaintiff "applied and was qualified for a job for which the employer was seeking applicants" and that "despite his qualifications, he was rejected." [128] In a discriminatory discharge case, the second and third elements of the prima facie case are fulfilled by showing that the plaintiff "was doing her job well enough to meet her employer's legitimate expectations" and that "despite her performance, she was discharged."[129]

However, adding an additional burden in place of the first element is a change of a different character. Rather than requiring a mere statement of class membership, courts which require a showing of background circumstances impose a heavy substantive burden on the reverse discrimination plaintiff. The purpose of the first element of the prima facie case, as the Court noted in *McDonald v. Sante Fe Trail Transportation Co.*, is to establish the character of the discrimination as racial.[130] The first element, as articulated by the Court, does not provide justification for the presumption. The other elements of the prima facie case eliminate common reasons for the action and thus, to some extent, they justify the presumption. However, the first element merely establishes the type of discrimination claimed. Courts which require a showing of background circumstances fail to acknowledge the Court's statements and instead of merely changing the element to require the reverse discrimination plaintiff to state class membership, require an additional showing which is not required of members of other groups. Those courts go beyond the stated purpose of establishing the type

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124. *Furnco*, 438 U.S. at 579-80.
125. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
126. *Id.* at 255.
127. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).
128. *Id.* at 802.
129. Hong v. Children's Mem'l Hosp., 993 F.2d 1257, 1261 (7th Cir. 1993).
130. 427 U.S. 273, 279 n.6 (1976).

of discrimination at issue to require substantive proof which often amounts to a showing of past discrimination against the members of the plaintiff's class.[131]

Moreover, the purpose of the prima facie case is to allow the plaintiff to get past the summary judgment stage of litigation. Therefore, the burden imposed upon the plaintiff in establishing the prima facie case is "not onerous".[132] The factual showing required to meet it is "minimal."[133] However, when the plaintiff is required to show background circumstances indicating discrimination against the class to which the plaintiff belongs, the burden of establishing a prima facie case becomes onerous, especially in light of the uncertainty and apparent discretion of the judge in determining whether the requirement has been met.[134] The reverse discrimination plaintiff is required to do more than eliminate nondiscriminatory reasons for the action, the plaintiff must use the first element to justify the inference, a requirement not imposed upon members of historically disadvantaged groups.

The background circumstances requirement does not honor the purposes of the prima facie case articulated by the Court. It requires the reverse discrimination plaintiff to do more than eliminate legitimate nondiscriminatory reasons for the defendant's actions; the plaintiff must justify the inference by making a factual showing without clear standards to provide guidance as to what facts must be shown. It also unjustly forces the plaintiff to bear responsibility for the discriminatory acts of others. Furthermore, the courts which impose the requirement fail to recognize that the establishment of the prima facie case merely creates an easily rebuttable presumption of discrimination; it does not actually establish the existence of discrimination. The burden imposed by those courts to establish the rebuttable presumption is unjustifiably heavy in view of the Court's recognition that the function of the first element is to establish the type of discrimination being claimed in the case. Therefore, in light of the purposes of the prima facie case, courts should not impose a requirement of a showing of background circumstances supporting the suspicion that the defendant discriminates against the majority.

C. Modifications to the Framework

The Court has continued to modify the framework since its establishment in *McDonnell Douglas*. In *St. Mary's Honor Center v. Hicks*, the Court ruled that

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131. *See* Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1018 (D.C. Cir. 1981) (requiring a showing that the defendant had unlawfully discriminated against members of the plaintiff's class in the past).

132. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The initial elements of the prima facie case are simple to prove and designed to allow the plaintiff to get past summary judgment without direct evidence. Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 24 n.19 (1991).

133. St. Mary's Honor Ctr. v. Hicks, 509 U.S 502, 506 (1993).

134. *McDonnell Douglas*, 411 U.S. at 805 n.19.

after a defendant articulates a legitimate, nondiscriminatory reason for its action, the plaintiff must show intentional discrimination.[135] The plaintiff cannot merely show that the defendant's reason was false, but must also show that the real reason for the action was discrimination.[136] This modification is significant to the resolution of the proper form of the prima facie case for reverse discrimination claimants.

In a reverse discrimination case where the court requires a showing of background circumstances and the plaintiff survives a summary judgment motion, the plaintiff will already have produced some evidence showing intentional discrimination.[137] Although that will put a reverse discrimination plaintiff who has survived summary judgment in a strong position, it prevents those plaintiffs who cannot show background circumstances indicating discrimination at the early summary judgment stage from later proving the case in court. According to *Hicks*, the plaintiff must be able to show discrimination to win the case; however, it is unjust to require a majority or male plaintiff to make a similar but broader showing merely to survive summary judgment.[138]

The purpose of the requirement in *Hicks* is to prevent abuse of Title VII.[139] There is a risk of abuse when all the plaintiff needs to do to win the case is to show that the employer advanced a false reason for its action. However, the requirement in *Hicks* eliminates that risk by requiring proof of intentional discrimination. The protection against abuse applies equally to reverse discrimination claims. Neither a member of a majority class nor a member of a historically disadvantaged class can prevail using the *McDonnell Douglas* framework in the absence of a showing of intentional discrimination against the plaintiff. Therefore, there is no reason to require a reverse discrimination plaintiff to show that the defendant has discriminated against members of his or her class in the past. In light of the requirement of explicit proof of discrimination against the individual plaintiff, the requirement of additional proof of discrimination at the outset of litigation places an unduly heavy burden upon a reverse discrimination plaintiff.

D. The Court's Approach to Discrimination

Some of the Court's discrimination decisions which did not specifically address the *McDonnell Douglas* framework are also informative in determining the proper form of the prima facie case for reverse discrimination plaintiffs.

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135. *Hicks*, 509 U.S. at 511.

136. *Id.* at 511 n.4. For a complete discussion of the implications behind the *Hicks* decision and the arguments against and in favor of the holding, see Tighe, *supra* note 37, at 339-49.

137. The plaintiff may meet the burden of proving intentional discrimination using circumstantial evidence. Tighe, *supra* note 37, at 352.

138. *But see* Tighe, *supra* note 37, at 355 (stating that the application of either the original version of *McDonnell Douglas* or that requiring a showing of background circumstances is suspect because *McDonnell Douglas* "is not a color-blind test").

139. Tighe, *supra* note 37, at 352-53.

These decisions reveal the Court's general approach to antidiscrimination litigation.[140] They include decisions addressing the purposes of Title VII itself and affirmative action decisions.

1. The Purposes of Title VII.—The Court has found that, in enacting Title VII, Congress did not intend to allow discrimination against some employees on the basis of race or gender merely because the employer treated other members of the same group favorably.[141] "The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."[142] Title VII focuses upon individual employees, not groups of employees. Because of that focus, the Court should not impose the background circumstances requirement upon majority plaintiffs. To do so would be to focus upon the employer's treatment of the group of employees to which the plaintiff belongs, rather than upon the treatment accorded to the individual employee bringing suit.

According to the *Parker* court's formulation of the background circumstances requirement, the plaintiff must show a pattern of discrimination against the entire class of employees to which he or she belongs.[143] The facts that the *Murray* court required, an affirmative action plan and that the other employees holding the plaintiff's position be of the opposite race, also relate, not to the employer's treatment of the individual, but to its treatment of the plaintiff's class of employees.[144] Similarly, the facts which the *Bishopp* court found made up a strong showing of background circumstances related to the employees' class, not to the plaintiff employees as individuals.[145] The courts which require background circumstances focus upon the plaintiff's class, not upon the individual plaintiff. However, Title VII protects individuals.

Furthermore, in *McDonald*, the Court rejected the defendant's argument that isolated incidents of discrimination against whites were acceptable.[146] The fact that the employer generally does not discriminate against members of the plaintiff's class does not determine whether it discriminated against the plaintiff. Even if an employer generally does not discriminate against whites or males, it may be liable under Title VII for discrimination against an individual white or male. This further shows that the Court should not require the plaintiff to prove

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140. Title VII has traditionally been criticized as economically unsound because it decreases net income, calculated to include monetary and psychic value. John J. Donohue II, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1420 (1986). However, commentators have begun to see that, although Title VII may have short-term adverse economic effects, it has long term economic benefits. *Id.* at 1431 (finding that "to the extent one prefers to see the costs of discrimination borne by the discriminators rather than the victims (who are undoubtedly less affluent), the normative appeal of the civil rights legislation is enhanced commensurately.").

141. Connecticut v. Teal, 457 U.S. 440, 455 (1982).

142. *Id.* at 453-54.

143. Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1018 (D.C. Cir. 1981).

144. Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 68 (6th Cir. 1985).

145. Bishopp v. Dist. of Columbia, 788 F.2d 781, 787 (D.C. Cir. 1986).

146. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 n.8 (1976).

anything additional in establishing the prima facie case; rather, the plaintiff only need eliminate the usual legitimate, nondiscriminatory reasons for the action.

Courts which require a showing of background circumstances argue that the Court has stated the purpose of Title VII in a way that indicates that it was primarily intended to protect minority and female employees.[147] Thus, they argue that imposing an additional burden upon male and majority plaintiffs to receive the protections of Title VII is justified. However, it is logical that some of the Court's statements were made in terms of the protection of minority and female plaintiffs[148] because the majority of cases brought under Title VII are brought by those groups. Nevertheless, very few of those statements were made in race or gender-oriented terms. Most were made in race and gender-neutral terms. Furthermore, the Court has explicitly stated that majority and male employees are protected groups under Title VII.[149]

In addition, the Court is now moving toward what has been called the "perpetrator perspective" in Title VII litigation.[150] The perpetrator perspective focuses upon the behavior of the employer accused of discrimination, rather than focusing upon the history of discrimination against a particular class protected under Title VII.[151] Under this viewpoint, Title VII is a "colorblind" statute. Its focus on nondiscrimination, rather than the protection of groups that were historically victims of unlawful discrimination.[152] The Court no longer focuses upon overcoming the effects of past discrimination, but upon ensuring that employers presently treat their employees equally, without regard to race, sex, or any other impermissible consideration.[153] "Race neutrality" is the overarching

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147. Murray v. Thistledown Racing Club, Inc., 770 F.2d at 67 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).

148. Collins v. School Dist., 727 F. Supp. 1318, 1321 (W.D. Mo. 1990).

149. *McDonald*, 427 U.S. at 278-79.

150. Freeman, *supra* note 40, at 1411-12.

151. *Id.* at 1412. For a discussion of the impact of employment discrimination upon racial minorities, see DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 591-94 (1980).

> In a society where both well-being and worth are judged by what one has and what one does, the denial of the opportunity to work inevitably results in the loss of motivation to work and lays the basis for these predictable syndromes: individual despair, family dissolution, aberrant behavior, and welfare dependency; all of which in the public mind boomerang back to blacks as characteristics that manifest their inferiority, inability, or at least unreadiness, for opportunities that whites take for granted.

Id. at 594.

152. ABRAHAM L. DAVIS & BARBARA LUEK GRAHAM, THE SUPREME COURT, RACE, AND CIVIL RIGHTS 373-79 (1995) (referring to the Court's 1988-89 terms as portraying a "cramped" view of Title VII litigation); Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1333-34 (1992).

153. In fact, one commentator remarked that "[t]he claims of white plaintiffs claiming 'reverse discrimination' receive an impassioned defense, while black victims of discrimination are treated with cool reserve." Michael C. Dawson, *Black Power in 1996 and the Demonization of African Americans*, POL. SCI. & POL'Y, Sept. 1, 1996, at 459.

concern of the Court.[154] The goal of Title VII is to establish "a truly colorblind society."[155] Thus, reverse discrimination claims have received equal treatment from the Court.[156]

Given this shift in the Court's perspective away from the historical discrimination against minorities and women and toward the actions of the individual defendant, the Court should not impose additional requirements upon reverse discrimination claimants in establishing a prima facie case. To do so would be inconsistent with the general thrust of its recent decisions. Title VII is intended to protect individual plaintiffs, rather than groups defined by class. Because the Court no longer views the history of discrimination against certain groups as the underlying rationale of Title VII, it would be illogical to impose different requirements upon majority and male plaintiffs due to the fact that these were historically favored groups. Furthermore, the values of nondiscrimination and a colorblind society virtually foreclose the application of different standards to reverse discrimination claimants. According to those values, the race or gender of the plaintiff would not change the viability of the presumption established by the prima facie case. Moreover, to impose more onerous standards solely upon the basis of the race or sex of the claimant would amount to the discriminatory application of an antidiscrimination statute. Therefore, the Court's overall view of Title VII shows that it should not require reverse discrimination plaintiffs to demonstrate background circumstances supporting a suspicion of discrimination.

2. Affirmative Action Decisions.[157]—In *Adarand Constructors, Inc. v. Pena*,

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154. Landsberg, *supra* note 152, at 1306. *But see* Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 195, 197 (1995) ("Whites who are presumed to be competent, such as Alan Bakke, frequently prevail upon a showing that race was a factor in an adverse decision. Blacks who are presumed to be incompetent, such as Melvin Hicks, rarely prevail upon a showing that race was a factor unless they can also present evidence of racial slurs or epithets."). Colker recommends that "courts must develop healthy skepticism toward the claims of reverse discrimination brought by white men." *Id.* at 225.

155. Michael Rosenfeld, *Decoding* Richmond: *Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1749 (1989).

156. Freeman, *supra* note 40, at 1412. Freeman criticizes this aspect of the Court's approach to race discrimination. He states that equal treatment of reverse discrimination claims would only be appropriate if our society had completely eliminated race discrimination. *Id.* However, discrimination against minorities remains predominant in our society. According to one study, discrimination against blacks is three times more common than discrimination against whites. MARGERY TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: DISCRIMINATION IN HIRING 75 (1991).

157. Authorities disagree upon the issue of the popularity of affirmative action plans. One study found that 75% of Americans oppose affirmative action plans. Joan O'Brien, *Affirmative Action: Is it Fair? Affirmative Action in Utah Facing a Test*, THE SALT LAKE TRIBUNE, March 27, 1995, at D1. Another study found that 55% of Americans favor affirmative action. William L. Kandel, *Affirmative Action and the Glass Ceiling: Contract Compliance and Litigation Avoidance*,

the Court decided that all governmental affirmative action programs will be subject to strict scrutiny review.[158] Prior to that decision, only the affirmative action programs of state and local governments had been subject to strict scrutiny.[159] The Court is thus moving toward a more restrictive view of the scope of permissible affirmative action programs. The imposition of the highest standard of review shows that the Court strongly opposes preferences granted on the basis of race or gender as a form of reverse discrimination.[160] The Court's treatment of discrimination claims challenging affirmative action programs is the same as its treatment of claims of discrimination against minorities and females.[161] In light of this attitude, it seems unlikely that the Court will make it more difficult for reverse discrimination claimant under Title VII to prove discrimination.

Adarand shows that the Court no longer gives great weight to the societal background against which discrimination takes place. The fact that certain groups were historically the victims of discrimination much more frequently than were members of other groups is not important to the determination of whether discrimination occurred in a particular case. Therefore, a history of discrimination by a particular employer will not be relevant to the establishment of intentional discrimination against the plaintiff. What is important is that the plaintiff in the individual case shows that discrimination occurred in that case. Thus, the requirement of background circumstances as formulated by the *Parker* court would not be significant in proving discrimination.[162]

Adarand also highlights two assumptions underlying the Court's race jurisprudence. Not only does the Court focus firmly upon discrimination by the

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21 EMPLOYEE REL. L.J., Autumn 1995, at 109, 112. Some people refer to affirmative action programs as reverse discrimination. Carl Senna, *The Ambiguities of Affirmative Action*, THE PROVIDENCE J.-BULL., Aug. 22, 1996, at B7.

158. 515 U.S. 200, 227 (1995). For a summary of the historical development leading to present affirmative action law, see ANDREW KULL, THE COLOR-BLIND CONSTITUTION 200-10 (1992). The Clinton administration has offered an opinion on the permissible scope of affirmative action plans. A recent memorandum warned that the only legitimate reason for an affirmative action plan is to remedy past discrimination. Promoting diversity is not sufficient. Steven G. Reade & Rosemary Maxwell, *Federal Affirmative Action Programs, Following Adarand, Are Being Revamped to Promote Diversity Through Measures That Don't Use Racial or Gender Preferences*, NAT'L L.J., Feb. 19, 1996, at B6.

159. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-25 (1989) (Scalia, J., concurring). For criticism of the reasoning underlying the decision, see Freeman, *supra* note 40, at 1432-33.

160. Even before the *Adarand* decision, commentators noted that the Court was "eas[ing] the burdens on whites seeking to show that race-conscious decisions discriminate against them . . . ." Landsberg, *supra* note 152, at 1272.

161. *Id.* at 1304.

162. Parker v. Baltimore, 652 F.2d 1012, 1018 (D.C. Cir. 1981). The court in *Murray* implied that proof of the existence of an affirmative action program will fulfill the background circumstances requirement. *See supra* note 109 and accompanying text.

defendant presently but it also sees Title VII as a vehicle to establish equality of opportunity, rather than equality of results.[163] Furthermore, the Court views the differences in racial and gender composition of different industries and positions, not as a reflection of past or present discrimination, but as a reflection of different preferences due to race and gender.[164] Thus, the formulations of the background circumstances requirement which require the plaintiff to show that the employees holding the plaintiff's position are predominantly of another race or gender will not be considered important. Race and gender composition may reflect many factors other than those impermissible under Title VII. It may reflect different group preferences rather than a lack of opportunity to fill certain positions.

Similarly, with respect to voluntary affirmative action plans, the Court has given little consideration to statistical disparities in the workforce.[165] Statistical disparities are similar to the *Murray* court's requirement that persons holding the plaintiff's job be of the opposite race or gender. Those disparities do not make the existence of discrimination more or less likely. Therefore, a reverse discrimination plaintiff should not be required to show statistical disparities to establish a prima facie case. The heavy burden imposed upon reverse discrimination plaintiffs is not balanced by a substantial benefit of rooting out claims which lack merit.

The Court has also removed procedural barriers which formerly prevented minorities from challenging affirmative action programs.[166] The change demonstrates that the Court believes reverse discrimination is such an important problem that it must be subject to challenge even when the plaintiffs have not acted at the first opportunity.[167] Because the Court believes that reverse discrimination is such a serious problem, it should not require reverse discrimination plaintiffs to bear a heavier burden in establishing a prima facie case. To impose the requirement would make reverse discrimination much more difficult to establish.

Recent developments in affirmative action law show that the Court should not impose an additional burden upon reverse discrimination plaintiffs. The Court now subjects all governmental affirmative action programs to strict scrutiny. In addition, the nation's history of discrimination against minorities and women is no longer considered important in determining whether discrimination has occurred in a specific case.[168] Disparities in the workforce are also not important, and the Court has removed procedural barriers that formerly prevented reverse discrimination challenges to affirmative action plans. These changes in the Court's approach to discrimination claims by majority plaintiffs show that the Court views the validity of such claims as equal to the validity of

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163. Freeman, *supra* note 40, at 1413.

164. Landsberg, *supra* note 152, at 1301-02.

165. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579 (1984).

166. Martin v. Wilks, 490 U.S. 755, 763 (1989).

167. Freeman, *supra* note 40, at 1432.

168. Landsberg, *supra* note 152, at 1272.

discrimination claims by minorities and women. Therefore, the Court should not impose a more onerous burden upon majority plaintiffs in establishing a prima facie case under Title VII.

CONCLUSION

The federal courts have been divided on the issue of the proper form of the prima facie case in a reverse discrimination claim for more than fifteen years. However, the recent growth in the number of reverse discrimination claims filed will require the Court to provide an answer to the question. The Court's previous decisions addressing the *McDonnell Douglas* framework and the prima facie case show that the Court should not impose any additional requirement upon reverse discrimination plaintiffs. The focus of Title VII is upon discrimination against individuals not groups. However, the background circumstances requirement forces the reverse discrimination plaintiff to prove discrimination by the defendant against members of the plaintiff's class generally in addition to discrimination against the plaintiff specifically. The lack of a clear standard to determine whether a plaintiff has met the requirement subjects the plaintiff to the risk of serious injustice due to a judge's beliefs about the merits of a particular case.

Furthermore, the additional requirement also forces the reverse discrimination plaintiff to do more than eliminate the most common, nondiscriminatory reasons for the defendant's action. The plaintiff must present substantive proof of discrimination to receive the benefit of the presumption. Minority and female plaintiffs do not have to meet that heavy burden to receive the same benefit. The requirement also ignores the fact that the purpose of the first element of the prima facie case is merely to establish the type of discrimination claimed. The background circumstances requirement converts the first element of the prima facie case into a requirement of substantive proof of discrimination.

In addition, the Court's decisions under affirmative action doctrine reveal a trend toward recognizing the validity of reverse discrimination claims upon the same terms as more traditional discrimination claims. The focus of antidiscrimination legislation is equality of opportunity rather than equality of result. A history of discrimination by the defendant employer is not important to the question of discrimination in the present case. Similarly, the historical patterns of discrimination in society are not pertinent to whether it has occurred in a particular case. Thus, the Court should not require a reverse discrimination plaintiff to demonstrate background circumstances indicating that the defendant discriminates against the majority.